

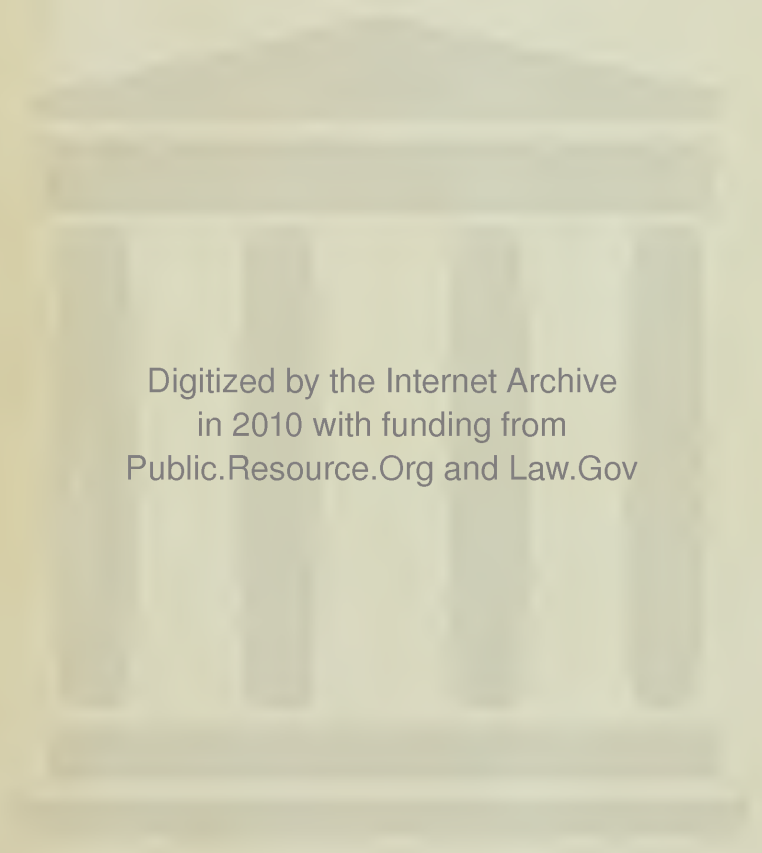
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No. 10574

2

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol
2369

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JAN 8 - 1944

PAUL P. O'BRIEN,
CLERK

No. 10574

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

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United States Attorney,
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JOSEPH KARESH,

Assistant United States Attorney,
Northern District of California.
Post Office Building,
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States
District Court for the Northern District
of California.

INDICTMENT

(No. 28056 R)

(Section 11, Selective Training and Service Act
of 1940, As Amended, 50 U.S.C.A. Sec. 311)

In the July 1943 term of said Division of said
District Court the Grand Jurors thereof on their
oaths present: That

JACK W. BAGLEY,

(whose full and true name is, other than herein-
above stated, to said Grand Jurors unknown).
hereinafter called "said defendant", being a male
citizen between the ages of twenty and forty-five
years, residing in the United States and under
the duty to present himself for and submit to
registration under the provisions of the "Selective
Training and Service Act of 1940, As Amended",
and thereafter to comply with the rules and reg-
ulations made pursuant thereto, and having in
pursuance of said Act, As Amended, and rules and
regulations made pursuant thereto become a reg-
istrant of Local Board No. 106 of the Selective
Service System, in the City of Redwood City,
County of San Mateo, California, which said Local
Board No. 106 was duly appointed and acting for
the area of which the said defendant is a registrant,
did, on or about the 17th day of July, 1943, in the
City of Redwood City, County of San Mateo, in

the Southern Division of the Northern District of California, and within the jurisdiction of this Court, knowingly and feloniously fail and neglect to perform such duty, in that he, the said defendant, having theretofore been [1*] classified in Class 1-A, did then and there knowingly feloniously fail to comply with the order of his said Local Board No. 106, to report for induction into the land or naval forces of the United States, as provided in the said Selective Training and Service Act of 1940, As Amended, and the rules and regulations made pursuant thereto.

FRANK J. HENNESSY

United States Attorney.

By W. E. LICKING,

Ass't. U. S. Atty.

Approved as to form:

R. M.Mc.M.

[Endorsed]: A true bill, Pearson Henderson,
Foreman.

Presented in Open Court and Ordered Filed
Aug. 3, 1943. C. W. Calbreath, Clerk. By J. A.
Schaertzer, Deputy Clerk. [2]

District Court of the United States,

Northern District of California

Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern

*Page numbering appearing at foot of page of original certified Transcript of Record.

District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday the 4th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

No. 28056-R.

UNITED STATES OF AMERICA,

vs.

JACK W. BAGLEY.

ARRAIGNMENT

This case came on regularly this day for arraignment. The defendant, Jack W. Bagley, was present in Court with his attorney Theodore Tamba, Esq. Joseph Karesh, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

Upon motion of Mr. Karesh, the defendant was called for arraignment. The defendant was informed of the return of the Indictment by the United States Grand Jury, and asked if he was the person named therein, and upon his answer that he was, and that his true name was as charged, said defendant was informed of the charge against him and stated that he understood the same. The Clerk read the Indictment to the defendant.

Upon motion of Mr. Tambia, it is ordered that

this case be continued to August 6, 1943, for entry of defendant's plea to Indictment. [3]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday the 6th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28056-R.

DEFENDANT'S PLEA OF NOT GUILTY
ENTERED; etc.

This case came on regularly this day for entry of the plea of the defendant. The defendant, Jack W. Bagley, was present with his attorney Wayne Collins, Esq. Joseph Karesh, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty"

to the Indictment filed herein against him, which said plea was ordered entered.

After hearing the Attorneys, it is ordered that this case be continued to September 28, 1943, for trial. [4]

[Title of District Court and Cause.]

VERDICT OF GUILTY

We, the Jury, find Jack W. Bagley, the defendant at the bar guilty as charged.

WILLIAM DOLGE

Foreman.

[Endorsed]: Filed Sep 29 1943. [5]

District Court of the United States. Northern
District of California, Southern Division.

UNITED STATES

vs.

JACK W. BAGLEY

No. 28056-R Criminal Indictment in One
count for violation of Section 11, Selective
Training and Service Act of 1940, As
Amended, 50 U.S.C.A. Sec. 311.

JUDGMENT AND COMMITMENT.

On this 29th day of September, 1943, came the
United States Attorney, and the defendant Jack

W. Bagley, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Viol. of Section 11, Selective Training and Service Act of 1940, As Amended, 50 U.S.C.A. Sec. 311—defendant, did, on or about July 17, 1943, in Redwood City, California, having theretofore been classified in Class 1-A, did then and there knowingly and feloniously fail to comply with the order of his said Local Board No. 106, to report for induction into the land or naval forces of the United States, as provided in the said Selective Training and Service Act of 1940, As Amended, and the rules and regulations made pursuant thereto; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is By the Court

Ordered and Adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two (2) Years: [6]

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) MICHAEL J. ROCHE

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Entered and Filed this 29th day of September, 1943.

(Signed) C. W. CALBREATH

Clerk.

By J. P. WELSH

Deputy Clerk.

Examined by:

JOSEPH KARESH,

Asst. U. S. Atty. [7]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Jack W. Bagley, Redwood City, California.

Offense: Violation of Selective Training and Service Act of 1940.

Date of Judgment: September 29, 1943.

Brief description of judgment or sentence: Two years in the federal penitentiary.

Name of prison where now confined: San Francisco County Jail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Dated Sept. 29, 1943.

JACK W. BAGLEY

Appellant.

GROUNDS OF APPEAL:

I. The judgment abridges the defendant's freedom of religion and freedom of conscience in violation of the First Amendment of the United States Constitution.

II. The judgment abridges the defendant's liberty without due process of law in violation of the Fifth Amendment of the United States Constitution, in that the defendant was denied a fair hearing by and before his local draft board and by the special assistant to the Attorney General, the Hearing Officer, in the following particulars:

1. The local draft board did not accord to the defendant the right to a personal appearance as required by paragraph 625.1 and 625.2 of the Selective Service Regulations, [8] in that the defendant was not given an opportunity to present his case supporting his claim for a classification as a conscientious objector; and in that said local board did not consider evidence thereafter submitted by the defendant in support of his claim, and said local board did not make an order of classification thereupon, as required by said Regulations.

2. Before said Hearing Officer, in that the defendant was not accorded an opportunity to present his claim before said Hearing Officer, and was not given an opportunity to meet, nor was he advised, of any adverse evidence against him, in violation of paragraph 627.25 of the Selective Service Regulations and the memorandum of the Attorney General of the United States; and said Hearing

Officer's report was made as the result of reliance upon such evidence.

3. The reviewing authorities in the Selective Service System in connection with an appeal to the President of the United States, were military officers in violation of Section 10 (a) (2) of the Selective Training and Service Act.

III. The Court erred in refusing to grant defendant's motion for new trial.

IV. The Court erred in refusing to grant defendant's requested instructions as excepted to.

V. The Court erred in giving instructions submitted by the prosecution as excepted to by the defendant.

VI. The Court erred in ruling upon evidence and rejection of proffered exhibits by defendant and rejecting defendant's offers of proof, as excepted to by defendant.

VII. The evidence was insufficient to justify a conviction. [9]

THEODORE TAMBA

511 Mills Building

San Francisco, California

A. L. WIRIN

257 S. Spring Street

Los Angeles, California

By A. L. WIRIN

Attorney for Appellant.

[Endorsed]: Filed Sep 29 1943. [10]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday the 4th day of October, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28056-R

INSTRUCTIONS RE RECORD ON APPEAL;
etc.

This case came on regularly this day for instructions relative to record on appeal. After hearing Joseph Karesh, Esq., Assistant United States Attorney, and Theodore Tamba, Esq., Attorney for defendant, It Is Ordered that the defendant may have ten (10) days within which to prepare his proposed Bill of Exceptions, and the United States to have ten (10) days thereafter to file its proposed Amendments. Further ordered that the Bill of Exceptions be settled and filed by October 25, 1943. [11]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR PREPARATION OF RECORD ON APPEAL AND ORDER EXTENDING TERM OF COURT.

Upon motion made in open Court by Theodore Tamba, Esq., on behalf of the defendant, Jack W. Bagley, and the Government consenting thereto, and good cause appearing therefor,

It Is Hereby Ordered that the time for the preparation of defendant's proposed bill of exceptions may be and the same is hereby extended up to and including the 25th day of October, 1943, and that the Government may have up to and including the 4th day of November, 1943 within which to submit amendments thereto;

It Is Further Ordered that the July, 1943, term of Court be likewise extended to the 4th day of November, 1943.

Dated at San Francisco, California, October 14, 1943.

MICHAEL J. ROCHE

Judge.

I hereby consent to the entry of the foregoing Order.

FRANK J. HENNESSY

[Endorsed]: Filed Oct 14 1943. [12]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday the 14th day of October, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28056-R.

TIME FOR SETTLEMENT OF BILL OF EXCEPTIONS EXTENDED TO NOVEMBER 4, 1943; JULY 1943 TERM OF COURT EXTENDED TO SAID DATE; etc.

On motion of Theodore Tamba, Esq., Attorney for defendant, and with the consent of A. J. Zirpoli, Esq., Assistant United States Attorney, it is Ordered that the time for the preparation of defendant's proposed Bill of Exceptions may be and the same is hereby extended up to and including the 25th day of October, 1943, and that the Government may have up to and including the 4th day of November, 1943, within which to submit amendments thereto. Further ordered that the *Jury* 1943 Term of this Court be likewise extended to the 4th day of November, 1943. Further ordered that

this case now on the calendar for October 25, 1943, be continued to November 4, 1943, for settlement of the Bill of Exceptions. [13]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday the 4th day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28056-R.

CASE CONTINUED TO NOVEMBER 8, 1943,
FOR SETTLEMENT OF BILL OF EX-
CEPTIONS; etc.

This case came on regularly this day for settlement as to the Bill of Exceptions. Wayne Collins, Esq., appeared as Attorney for defendant. The defendant was not present. Joseph Karesh, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

Upon motion of Mr. Collins and with consent

of Mr. Karesh, it is ordered that this case be continued to November 8, 1943, for settlement of the Bill of Exceptions. [14]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday the 8th day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28056-R.

CASE CONTINUED TO NOVEMBER 9, 1943,
FOR SETTLEMENT OF BILL OF EX-
CEPTIONS; etc.

This case came on regularly this day for settlement of Bill of Exceptions. Upon motion of Wayne Collins, Esq., Attorney for defendant, and with the consent of Joseph Karesh, Esq., Assistant United States, it is ordered that this case be continued to November 9, 1943, for settlement of the Bill of Exceptions. [15]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 9th day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28056-R.

ORDER RELEASING DEFENDANT ON
\$3,000.00 BAIL PENDING APPEAL; CASE
CONTINUED TO NOVEMBER 15, 1943;
FOR SETTLEMENT OF BILL OF EXCEP-
TIONS; JULY 1943 TERM EXTENDED TO
NOVEMBER 15, 1943

This case came on regularly this day for settlement of Bill of Exceptions. After hearing Wayne Collins, Esq., Attorney for defendant, and Joseph Karesh, Esq., Assistant United States Attorney, It Is Ordered that this case be continued to November 15, 1943, for settlement of the Bill of Exceptions. On motion of Mr. Collins, it is further ordered that the July 1943 Term of this Court be extended to November 15, 1943. Further ordered, on motion of Mr. Collins that the defendant Jack

W. Bagley may be released upon bail, on appeal, in the sum of \$3,000.00. [16]

[Title of Court and Cause.]

ORDER ALLOWING RELEASE ON BAIL ON
APPEAL

The defendant having filed a notice of appeal to the Ninth Circuit Court of Appeals, and good cause appearing therefor,

It Is Hereby Ordered that the defendant may be released upon bail, on appeal, in the sum of \$3000.00.

Dated: At San Francisco, California, this 9th day of November, 1943.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Nov 9 1943. [17]

ENGROSSED BILL OF EXCEPTIONS

Be It Remembered that the above-entitled cause came on for trial by jury before the Honorable Michael J. Roche, United States District Judge presiding, on the 28th day of September, 1943.

United States of America, plaintiff, appeared by Frank J. Hennessy, Esq., United States attorney and Joseph Karesh, Esq., Assistant United States attorney, and the defendant appeared in person and with counsel, A. L. Wirin, Theodore Tamba and

Wayne M. Collins, Esquires, whereupon the United States to maintain the issues on its part to be maintained, called as its first witness George F. Paul:

TESTIMONY OF GEORGE F. PAUL

George F. Paul, produced as a witness on behalf of the United States, being first sworn, testified as follows:

I am and ever since October 16, 1940, have been the chief clerk of Local Board 106 of the Selective Service System at Redwood City, San Mateo County, California. I have the care, custody and control of the records of the Board and am in charge of the correspondence of the Board. The defendant registered (U.S.Exh. 1) under the Selective Training & Service Act of 1940 and on August 14, 1942, filed his verified Selective Service Questionnaire, DSS Form 40, (U.S.Exh. 2) with said board. In [18] said questionnaire defendant declared he was a native born citizen of the United States, a single person, 22 years of age, a high school graduate and that he was employed as a ship fitter trainee by the Bethlehem Steel Company in San Francisco, assembling destroyers, at an average weekly rate of \$50.00 and that he contributed \$60.00 per month to the support of his parents. He also declared therein that he had worked one year in said job and expected to continue indefinitely in it and that he was then employed in national de-

(Testimony of George F. Paul.)

fense work. He also declared therein that "by religious training and belief I am conscientiously opposed to war in any form and for this reason that the Local Board furnish me a special form for conscientious objector, Form 47, which I am to complete and return to the Local Board." Thereafter, on August 27, 1942, defendant filed with Local Board 106 DSS Form 47 (U.S.Exh. 3a) special form for conscientious objector, claiming exemption from combatant and non-combatant military and naval service on the ground that he was a conscientious objector.

U. S. EXHIBIT NO. 1

REGISTRATION CARD—(Men born on or after February 17, 1897 and on or before December 31, 1921)

Serial Number T 749

1. Name (Print)

(First) Jack (Middle) Woodhouse (Last) Bagley.

Order No. T 11838

2. Place of Residence (Print)

(Number and Street) 2924 Jefferson Ave.,
(Town, township, village, or city) Redwood
City, (County) San Mateo, (State) Calif.

(The place of residence given on the line above will determine local board jurisdiction; line 2 of Registration Certificate will be identical.)

3. Mailing Address

(Testimony of George F. Paul.)

(Mailing address if other than place indicated on
line 2. If same insert word same.)

Same

4. Telephone

(Exchange) Redwood (Number) 3065-W

5. Age in Years

21

Date of Birth.

(Mo.) July (Day) 29 (Yr.) 1920

6. Place of Birth

(Town or county) Cleveland (State or county)
Ohio

7. Name and Address of Person Who Will Always
Know Your Address

John W. Bagley 2924 Jefferson Ave. Redwood
City, Cal.

8. Employer's Name and Address

Bethlehem Steel Co. Ship Building Div. 20th
Illinois St. S. F.

9. Place of Employment or Business

(Number and street or R. F. D. number) 20th
& Illinois St. (Town) San Francisco (Coun-
ty) (State) Calif.

I Affirm That I Have Verified Above Answers
and That They Are True.

D.S.S. Form 1 JACK W. BAGLEY

(Revised 1-1-42) (over) (Registrant's signature)

(Testimony of George F. Paul.)

REGISTRAR'S REPORT

Description of Registrant

RACE

White ✓

Negro

Oriental

Indian

Filipino

HAIR

Blonde

Red ✓

Brown

Black

Gray

Bald

HEIGHT (Approx.)

6' 1"

COMPLEXION

Sallow

EYES

Light

Blue

Ruddy ✓

Gray

Dark

Hazel

Freckled

Brown ✓

Light brown

Black

Dark brown

Black

WEIGHT (Approx.)

170

Other obvious physical characteristics that will aid in identification

None

I certify that my answers are true; that the person registered has read or has had read to him his own answers; that I have witnessed his signature

(Testimony of George F. Paul.)

or mark and that all his answers of which I have knowledge are true, except as follows:

W. H. DOXSEE

(Signature of registrar)

Registrar for Local Board (Number) 106 (City or county) Redwood City (State) Calif.

Date of registration Feb. 15, 1942

(Stamp of Local Board)

(The stamp of the Local Board having jurisdiction of the registrant shall be placed in the above space)

[Endorsed]: Filed 9-28-43.

U. S. EXHIBIT NO. 2

SELECTIVE SERVICE QUESTIONNAIRE

Order No. T-11838

Date of mailing August 14, 1942.

[Stamp of Local Board]: Local Board No. 106—91 081 106. San Mateo County. Aug 14 1942, Schaberg Bldg. Redwood City, California.

Name: (First) Jack (Middle) Woodhouse (Last) Bagley.

Address: (Number and street or R. F. D. route) 2924 Jefferson Avenue, (City or town) Redwood City (County) San Mateo (State) Calif.

Notice to Registrant

You are required by the Selective Service Regulations to fill out this Questionnaire truthfully and

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

to return it to this local board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

This Questionnaire Must Be Returned on or Before August 24, 1942.

[ILLEGIBLE]

Member of Local Board.

(The above items are to be filled in by the local board before the Questionnaire is mailed to the registrant.)

INSTRUCTIONS

This Questionnaire is intended to furnish the local board with information to enable it to classify you. You will receive notice from your local board of your classification.

Oaths required in the Questionnaire may be administered by any civil officer authorized to administer oaths generally, any commissioned officer of the land or naval forces assigned for duty with the Selective Service System, any member or clerk of a local board or board of appeal, any government appeal agent or associate government appeal agent, any member or associate member of an advisory board for registrants, any postmaster, acting postmaster or assistant postmaster.

Advisory boards for registrants are organized to assist registrants in completing their Questionnaires. No charge will be made for this service. Information as to the location of a member of the

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

advisory board for registrants who will assist in completing this form may be obtained from the local board office. If there is no advisory board member available, you must nevertheless complete your Questionnaire.

If the registrant is an inmate of an institution and is unable to complete the Questionnaire, the executive head of the institution shall communicate these facts immediately to the local board.

1. Make no alterations in the printed matter in this Questionnaire.

2. All spaces in this Questionnaire that apply to registrants must be filled in with the proper words.

3. If you furnish additional information or affidavits with your Questionnaire, attach the same securely to it.

4. If you are already in the active military or naval service, obtain a certificate to that effect from your commanding officer and attach same to your Questionnaire.

5. After this Questionnaire has been returned, report to your local board at once any change of address or any new fact which may affect your classification.

Statements in this Questionnaire marked (Confidential) are for information only of the officials duly authorized under the regulations.

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

Use Ink or Typewriter in Filling Out This Form
D. S. S. Form 40

(Revised Jan 12, 1942)

STATEMENTS OF THE REGISTRANT

Series I.—Identification

Instructions—Every registrant shall fill in all statements in this series.

1. My name is (print) (First name) John (Middle name) Woodhouse (Last name) Bagley.

2. In addition to the name given above, I have also been known by the name or names of (If none, write “None”) Jack.

3. My residence now is (Number and street or R. F. D.) 2924 Jefferson Ave. (Town—[City, town, or village]) Redwood City (County) San Mateo (State) California.

4. My telephone number now is (Town) Redwood (Exchange) (Number) 3065W (If you have no phone, write “None”)

5. My Social Security number is (If none, write “None”) 547-26-3170.

6. I was 22 years of age on my last birthday.

Series II.—Physical Condition (Confidential)

Instructions.—Every registrant shall fill in all statements in this series.

1. To the best of my knowledge, I (have, have no) have physical or mental defects or diseases. If so, they are (List defects or diseases here) evidence of hernia.

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

2. I (am, am not) am not an inmate of an institution. If so, its name is (Name of hospital, prison, or other institution) and it is located at (Give address)

Series III.—Education

Instructions.—Every registrant shall fill in all statements in this series.

1. I have completed (Number) 8 years of elementary school and (Number) 3½ years of high school.

2. I have had the following schooling other than elementary and high school (if none, write "None"):

Name of Vocational School, College, or University, Shipfitter's School Course of Study Shipfitting
Length of Time Attended 3 months.

3. I (can, cannot) can read and write the English language.

Series IV.—Present Occupation or Activity

Instructions.—Every registrant shall fill in No. 1 of this series; every registrant now at work shall fill in No. 2; every registrant now unemployed shall answer No. 3; and every registrant who is now a student, whether or not he also has a job, shall fill in No. 4.

1. (Put an X in one box) I am now [X] working at the job described under No. 2 below.

[] Unemployed for the reasons and under the circumstances described in my answer to No. 3 below.

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

[] a student pursuing the course of study described under No. 4 below.

2. (a) The job I am now working at is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, policeman, marriage-license clerk, etc.):

Shipfitter Trainee.

(b) I do the following kind of work in my present job (be specific—give a brief statement of your duties): Assemble Destroyers.

(c) I have had 1 years experience in this kind of work.

(d) My average (weekly, monthly, annual) weekly earnings in my present job are \$50.00 (Confidential.)

(e) In my present job I am—(Put an X in one box)

[X] a regular or permanent employee, working for salary, wages, commission, or other compensation; I have worked 1 years in my present job, and expect to continue indefinitely in it.

[] a temporary or occasional employee; I expect that my present job will end about (Date)

[] an apprentice under a written or oral agreement with my employer, which expires (Date)

[] an independent worker, working on my own account, not hired by anyone, and not hiring any help.

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

[] working for my father or for the head of my family, but receiving no pay.

[] an employer or proprietor hiring (Number) paid workers.

(f) I (am, am not) am now employed in national defense work.

(g) My employer is: (Name of organization or proprietor, not foreman or supervisor) Bethlehem Steel Co. Shipbuilding Division (Address of place of employment—street or R. F. D. route, city, and State) 20th & Illinois Sts. San Francisco, California, whose business is (For example: Farm, airplane engine factory, retail food store, W. P. A.) Mfg. of steel and fabrication of same.

(h) Other business or work in which I am now engaged is (If none, write "None") None.

Instructions.—If your employer believes that you are a necessary man in a necessary occupation, it is his duty to fill out Form 42A requesting your deferment. You may also attach to this page any further statement by yourself which you think the local board should consider in determining your classification. Such statement will then become a part of the Questionnaire

3. If you are not now working, attach to this page a statement (a) giving the reasons for your unemployment, when it began, and when you expect to be able to resume your work, and (b) supplying substantially the same information regarding your last job as is required in Items 2 (a) to 2 (f) above.

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

4. (a) (If a student) I am majoring in.....
.....preparing for (Occupation or profession)..... at (Name and address of school or college).....

(b) I expect to complete this training on (Date).

(c) I (do, do not) intend to take an examination for license in (Profession). Date of examination

Instructions.—A student who believes that he should be placed in Class II because preparing for a necessary occupation should see that the head of his school files with the local board the necessary supporting evidence.

Series V.—Agricultural Occupations

Instructions.—Every registrant who works on a farm shall fill in this series, in addition to filling in Series IV and VI.

1. I work on or operate a farm as—(Put an X in the correct box)

☐ sole owner of the farm. ☐ joint owner with (Name) (Address)

☐ hired manager ☐ cash tenant or renter
☐ standing rent tenant ☐ share cropper ☐ share tenant. My agreement (if any) expires (Month) (Day) (Year).

☐ wage hand (hired man). ☐ unpaid family worker.

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

not, her address is.....; we were married at (Place) on (Date).

2. (a) I have (Number) children under 18 years of age.

(b) Of these children (Number) live with me in my home.

Instructions.—Every registrant who lives in a family group and contributes to the support of that group shall fill in statement No. 3. "Family group" as used in this statement means two or more persons related by blood, marriage, or adoption, who live together and who pool all or a substantial part of their individual incomes for their joint support. (Such a group may not always include everyone who lives in the same house or eats at the same table. For example, when a registrant and his wife and children share a house with other relatives but do not share the income of those other relatives, the family group to be listed here would include only the registrant and his wife and children.)

The information here given is intended to describe only the economic situation of the family group as it now exists and is not intended to suggest that by altering their present domestic arrangement, present dependents of the registrant might obtain support from other persons who are not now supporting them.

3. (a) The following is a list of all members of the family group in which I live (list yourself first):

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

Name (Name of registrant) Jack Woodhouse
Bagley.

Sex Male

Age last birthday 22

Relationship to me Self.

Date I began to contribute to this person's support. (If not contributing, write "N. C.") x x x x x

Amount this person earned by work during past 12 months \$2761.04.

(b) I contributed \$2761.04 during the last 12 months to the support of the above-listed family group.

(c) In addition to the earnings shown in table 3 (a), only the following other income was received by members of this family group during the past 12 months. (State the nature and source of every item of income whether in cash or other things of value. Include income from property, relief payments, and contributions from persons outside this group. Give name, address, relationship, and age of each person outside the family group making such contributions): (blank).

Instructions.—Every registrant who contributes to the support of one or more persons who are not members of the family group listed above shall fill in statement No. 4.

4. (a) The following persons who are not members of the family group listed above depend wholly or partly for support on what I earned by my work in my business, occupation, or employment; they

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

had no other sources of income during the past 12 months, except as stated below:

[Blank form not filled in.]

(b) Of the amounts contributed by me to dependents listed in 4 (a) only (If none, write "None") \$. contributed to (Name of dependent) was in payment for my own board and lodging.

(c) The sources of the "other income" shown in the last column of the table just above were as follows: (Give name of dependent and state whether income was earned or contributed; if contributed, give name of dependent and name and address of person or agency contributing.)

(d) The income I earned from my work in my business, occupation, or employment during the past 12 months was \$2761.04.

(e) My income from all other sources during the past 12 months was \$.

Instructions.—Every registrant who fills in either statement No. 3 or No. 4 shall also fill in the statements numbered 5 through 9 in this series.

[Blank form not filled in.]

7. I (do, do not) do not rent the house or apartment in which I live; if so, the monthly rent now is \$.

8. I have contracted to purchase the following property (if none, write "None"):

Kind of Property None.

Date of Contract (blank).

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

Balance Now Outstanding (blank).

Monthly Payments (blank).

9. Other facts which I consider necessary to present fairly my own status and that of my dependents as a basis for my proper classification are (if none, write "None"):

I live with my parents and pay \$60.00 per month to help with expenses.

Instructions.—With respect to any dependent (other than the registrant's own wife or child) whose support the registrant has assumed, the registrant shall furnish to the local board an affidavit of the person for whom dependency is claimed (or from the person's guardian if he is incompetent), explaining why and under what circumstances the registrant assumed such person's support. Copies of Form 40-A for this purpose may be obtained from the local board. If the dependent lives at a distance, do not delay return of the Questionnaire pending receipt of the affidavit; forward the affidavit as soon as received and it will then become a part of this Questionnaire.

Series VIII.—Minister, or Student Preparing for the Ministry

Instructions.—Every registrant who is a minister or a student preparing for the ministry shall fill in the statements in this series that apply to him.

1. (a) I (am, am not) am not a minister of religion.

[Blank form not filled in.]

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

Series IX.—Citizenship

Instructions.—Every registrant shall fill in the statements numbered 1, 2, 3, and 4 in this series.

1. I was born at (Town) Cleveland (State) Ohio (Country) U. S. A.

2. I was born on (Month) July (Day) 29 (Year) 1920.

3. My race is:

☒ White;

☐ Negro;

☐ Oriental;

☐ Indian;

☐ Filipino;

Other (specify)

4. I (am, am not) am a citizen of the United States.

Instructions.—Every registrant who is not a citizen of the United States shall fill in the statements numbered 5, 6, 7, and 8.

[Blank form not filled in.]

Series X.—Conscientious Objection to War

Instructions.—Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector (Form 47) from the local board which must be completed and returned to the local board for consideration.

By reason of religious training and belief I am conscientiously opposed to war in any form and

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

for this reason request that the local board furnish me a Special Form for Conscientious Objector (Form 47) which I am to complete and return to the local board.

JACK WOODHOUSE BAGLEY
(Signature)

Series XI.—Court Record (Confidential)

Instructions.—Every registrant shall fill in statement No. 1.

1. I (have, have not) have not been convicted of a crime, other than minor traffic violations.

Instructions.—Every registrant who has ever been convicted of a crime, other than minor traffic violations, shall fill in statement No. 2, listing all convictions.

2. The record of my convictions is as follows:

[Blank form not filled in.]

3. I (am, am not) am not now being retained in the custody of a court of criminal jurisdiction, or other civil authority.

Series XII.—Military Service (Confidential)

Instructions.—Every registrant who now is or has been a member of the armed forces of the United States shall fill in the statements in this series. (Use a separate line for each term of service.)

[Blank form not filled in.]

Series XIII.—Present Members of Armed Forces,
Certain Officials, Etc.

Instructions.—Every registrant who is a member

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

of one or more of the groups named in this series shall check the appropriate item or items and shall supply any further information called for under the item or items checked.

I am at present:

1. [] A commissioned officer, warrant officer, pay clerk, or enlisted man of the Regular Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, the Public Health Service, the federally recognized active National Guard, the Officers' Reserve Corps, the Regular Army Reserve, the Enlisted Reserve Corps, the Naval Reserve, the Marine Corps Reserve, or the Coast Guard Reserve; my rank or commission is.....in the (Name of service)

2. [] a cadet, United States Military Academy; midshipman, United States Naval Academy; cadet, United States Coast Guard Academy; man who has been accepted for admittance (commencing with the academic year next succeeding such acceptance) to the United States Military Academy as cadet, to the United States Naval Academy as midshipman, or to the United States Coast Guard Academy as cadet, and whose acceptance is still in effect; cadet of the advanced course, senior division, Reserve Officers' Training Corps or Naval Reserve Officers' Training Corps; I am (A cadet, midshipman, or accepted for admittance) in (Name of corps, academy, etc.)

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

3. [] The Governor of a State or Territory, a member of a legislative body of the United States or of a State or Territory, a judge of a court of record of the United States or of a State or Territory or the District of Columbia; my office is:

.....

Registrant's Statement Regarding Classification

Instructions.—It is optional with registrant whether or not he fills in this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which should be taken fully into consideration regardless of whether or not this statement is filled in.

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class.....

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local board in determining his classification.

Registrant's Affidavit

Instructions.—1. Every registrant shall make the registrant's affidavit. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

State of California,

County of San Mateo,—ss:

I, Jack Woodhouse Bagley, do solemnly swear (or affirm) that I am the registrant named and described in the foregoing statements in this Questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing (are, are not) are in my own handwriting.

Registrant sign here

JACK WOODHOUSE BAGLEY.

(Signature or mark of registrant)

Subscribed and sworn to before me this 25th day of August, 1942.

FLORENCE W. MAGRUDER

(Signature of officer)

Member of Advisory Draft Bd. # 106.

(Designation of officer)

If another person has assisted the registrant in filling out this Questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this Questionnaire because (For example—Registrant unable to read and write English, etc.)

.....
(Signature of Advisor)

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

Instructions.—Registrant shall write nothing below this line when filling out the Questionnaire.

Minute of Action on Request for Extension of Time
for Filing Claim or Proof

The application of.....
to have time for filing claim or proof extended to
....., 19.... is (granted, refused) for the
reason that

(Date)

Member.

Minute of Action by Local Board No.....,
County, State.....

The local board classifies the registrant in Class
1, Subdivision A, by the following vote: Yes 4,
No 0 (Date) 10/8/42. ✓

W. H. DOXSEE

Member.

Appeal to Board of Appeal

I hereby appeal to the board of appeal from the
determination of the local board.

(Date) blank. (Signature of person appealing)
blank. (Relationship to registrant, i. e., parent,
employer, appeal agent, etc.) blank.

Minute of Action by Board of Appeal No. 9,
County of Santa Clara, State Cal.

The board of appeal classifies the registrant in

(Testimony of George F. Paul.)

U. S. Exhibit No. 2—(Continued)

Class 1, Subdivision A, by the following vote: Yes 3
No 0. (Date) May 26th 1943.

C. C. COOLIDGE.

Member.

Appeal to President

I hereby appeal to the President from the determination of the board of appeal.

(Date) blank. (Signature of person appealing)
blank. (Relationship to registrant, i. e., parent,
employer, appeal agent, etc.) blank.

Minutes of Other Actions

Dates 9/24/42 Refer to doctor 4—0.

✓10/5/42 Registrant appeared before board re appeal, no action W.H.D.

Minutes of Other Actions of Board of Appeal

Dec. 16th, 1942. This Board of Appeal has reviewed the file of registrant and has determined that the registrant should not be classified in Class 1-C, Class IV-F, Class IV-D, Class IV-C, Class IV-B, Class IV-A, Class III-B, Class III-A, Class II-B, Class II-A or Class I-H.

C. C. COOLIDGE,

Member.

6/12/43 Registrant notified of appeal board action.

[Endorsed]: Filed 9/28/43.

(Testimony of George F. Paul.)

U. S. EXHIBIT NO. 3A

SPECIAL FORM FOR CONSCIENTIOUS
OBJECTOR

Order No.

Aug 28 '42

F 11838

(Stamp of Local Board)

Name (First) John (Middle) Woodhouse (Last)
Bagley

Address (Number and street or R.F.D. route)
2924 Jefferson Ave.

(City, town, or village) Redwood City (County)
San Mateo (State) Calif.

This form must be returned on or before (Five
days after date of mailing or issue)

Instructions

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Questionnaire.

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information only of the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the Local Board shall proceed in the ordinary course to classify him upon all other grounds of deferment, and shall consider and pass upon his claim as a conscientious objector only if, but for such claim, he would have been

(Testimony of George F. Paul.)

placed in Class I. The procedure for appeal from a decision of the Local Board on a claim for conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector: Provided, however, That the Local Board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—Claim for Exemption

Instructions.—The registrant must sign his name to either Statement A or Statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

A. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in combatant military service or training therefor; but I am willing to participate in non-combatant service or training therefor under the direction of military authorities.

.....

(Signature of registrant)

[Printer's Note: Preceding paragraph has check mark through it.]

(Testimony of George F. Paul.)

B. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in any service which is under the direction of military authorities.

JACK WOODHOUSE BAGLEY,
(Signature of registrant)

Series II.—Religious Training and Beliefs

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Describe the nature of your belief which is the basis of your claim made in Series I above.

I believe in the Ten Commandments, The Golden Rule and The Sermon on the Mount.

“Thou shalt not kill.”

2. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

Home training and Christian contacts throughout my life.

3. Give the name and present address of the individual upon whom you rely most for religious guidance.

My mother, Mrs. J. W. Bagley, 2924 Jefferson Ave., Redwood City, California.

4. Under what circumstances, if any, do you believe in the use of force?

(Testimony of George F. Paul.)

I do not believe in human bloodshed.

5. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

The stand I am taking at the present time, making public my opinions, I feel demonstrate the depth of my religious convictions.

6. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

No.

Series III.—General Background

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, private, church, military, commercial, etc.).

Name of School—Central School. Type of School—Grade. Location of School—Berea, Ohio. Dates Attended—From—1926 To—1932.

Name of School—Berea High School. Type of School—Junior High. Location of School—Berea, Ohio. Dates Attended—From—1932 To—1934.

Name of School—Alameda High School. Type of School—High. Location of School—Alameda, Calif. Dates Attended—From—1934 To—1937.

(Testimony of George F. Paul.)

Name of School—Sequoia Union High. Type of School—High. Location of School—Redwood City, Calif. Dates Attended— From—1937 To—1939.

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged:

Type of Work—Auto Mechanic. Name of Employer—David H. Willard. Address of Employer—Jefferson Ave., Redwood City, Cal. Period Worked—From—1938 To—1940.

Type of Work—Assistant Farm Manager. Name of Employer—Miss F. Gertrude Akins. Address of Employer—Columbia Station, Ohio. Period Worked—From—1940 To—1941.

Type of Work—Auto Mechanic. Name of Employer—Perry Heineman. Address of Employer—Columbia Station, Ohio. Period Worked—From—1940 To—1941.

Type of Work—Shipfitter. Name of Employer—Bethlehem Steel Co. Address of Employer—San Francisco, Calif. Period Worked—From—1941 To—1942.

3. Give all addresses and dates of residence where you have formerly lived:

Name of City, Town, or Village—Berea, ~~Ohio~~. State or Foreign Country—Ohio. Street Address or

(Testimony of George F. Paul.)

R. F. D. Route—168 Front St. Dates of Residence—From 1920 To—1934.

Name of City, Town, or Village—Alameda. State or Foreign Country—California. Street Address or R. F. D. Route—1215 Park Ave. Dates of Residence—From—1934 To—1937.

Name of City, Town, or Village—Redwood City. State or Foreign Country — California. Street Address or R. F. D. Route—2924 Jefferson Ave. Dates of Residence—From—1937 To—1940.

Name of City, Town, or Village—Columbia Station. State or Foreign Country—Ohio. Street Address or R. F. D. Route—West River Road RFD 2. Dates of Residence—From—1940 To—1941.

Name of City, Town, or Village—Redwood City. State or Foreign Country — California. Street Address or R. F. D. Route—2924 Jefferson Ave. Dates of Residence—From—1941 To—1942.

4. Give the name, address, and country of birth of your parents and indicate whether they are living or not.

John W. Bagley, Canada. Living.

Urina A. Bagley, U. S. A. Living.

Series IV.—Participation in Organizations

Instructions.—Questions 1, 2, and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

(Testimony of George F. Paul.)

Civilian Conservation Corps April and May 1940
Tulomme, Calif.

2. Are you a member of a religious sect or organization? (Yes or no)—No. If your answer to question 2 is yes, answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you:

(b) When, where, and how did you become a member of said sect or organization?

(c) State the name and location of the church, congregation, or meeting where you customarily attend:

(d) Give the name and present address of the pastor or leader of such church, congregation, or meeting:

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war:

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than religious or military:

Series V.—References

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war:

Name—Mable Skinner. Full Address—464 Ruby St., Redwood City. Occupation or Position—Housewife. Relationship to You—None.

(Testimony of George F. Paul.)

Name—Daniel La Fountain. Full Address—2809
Jefferson Ave. Occupation or Position—Painter.
Relationship to You—None.

Name—Martha La Fountain. Full Address—2809
Jefferson Ave. Occupation or Position—House-
wife. Relationship to You—None.

Name—Thomas Skinner. Full Address—464 Ruby
St. Occupation or Position—Mechanic. Rela-
tionship to You—None.

Registrant's Affidavit

Instructions.—The claim made on this form will not be considered unless it is supported by the following affidavit. (If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.)

State of California, County of San Mateo, ss:

I, John (Jack) Woodhouse Bagley, do solemnly swear (or affirm) that I am the registrant described in the foregoing questions and answers, that I know the contents of my said answers, and that each and every statement of fact in my answers to said questions is true, to the best of my knowledge and belief.

(Registrant sign here)

JACK WOODHOUSE BAGLEY.

(Signature or mark of registrant)

(Testimony of George F. Paul.)

Subscribed and sworn to (or affirmed) before me
this 27 day of August, 1942.

H. E. HOLMQUIST.

(Signature of officer administering oath)

Ass. Member Advisory Board
#106.

(Designation of officer)

If the registrant has received assistance from an
advisor, the advisor shall sign the following state-
ment:

I have assisted the registrant herein named in
the preparation of this form.

(Signature of advisor)

(Address of advisor)

[Endorsed]: Filed 9/28/43.

U. S. EXHIBIT NO. 3-b

Supplementary Information for Form 47#

Answer to Question C:—

I am conscientiously opposed to participation in
war in any form, and cannot conscientiously engage
even in non-combatant military service because of
my religious training and Christian beliefs. War
and Killing are against God's laws and man's laws.

If we do not destroy War now, War will destroy

(Testimony of George F. Paul.)

us. Wars cost too much; they produce economic chaos, they demoralize the people and they waste human life. War breeds war.

Answer to Question II:—

My Parents are Pacifists and so as a child I never had any military toys such as guns, soldiers, cannons etc. As a child I attended Methodist Sunday School and Church. I have never been hunting as I have always been taught it was wrong to kill animals for sport.

I have been taught all my life that war is stupid, a crime against humanity, that when enough people know enough wars will cease.

Answer to Question III:—

My Mother. Mrs. John W. Bagley.

Answer to Question IV:—

I'd defend myself against personal attack, but I wouldn't try to kill anybody to stop them from harming me.

The police are taught not to kill anybody unless it can't be helped. There are other methods for stopping people from doing violence other than killing them.

"Every war after it begins is a war of defense. Trust Politicians and Statesmen for that." Emily Newell Blair. pg 83 "Why Wars Must Cease."

Answer to Question V:—

I have attended many religious services and lectures by pacifists, such as John Nevin Sayre, Norman Thomas, and many others.

(Testimony of George F. Paul.)

I have been contributing toward establishment of World Peace ever since I have been earning enough to do so. I have never been in a fight or seen a prize fight.

Answer to Question V:—(Continued.)

I would not work in a Munition plant at any wage.

Even if my friends or family would turn against me for taking this stand against war, I would still stand my ground.

Answer to Question VI:—

I have talked against war to the majority of people that I have come in contact with ever since the war in Europe started. Wars destroy democracy instead of saving it, war brings no permanent peace, and war degrades humanity since warring men bestialize themselves.

JACK W. BAGLEY,
2924 Jefferson Avenue,
Redwood City, California.

[Endorsed]: Filed 9/28/43.

On October 8, 1942, said board classified defendant 1-A under the Selective Training & Service Act of 1940 as available for general military and naval service and mailed a notice of classification to defendant. Thereafter defendant timely appealed (U.S.Exh.4) from said classification to Appeal Board No. 9 situated in San Jose, California,

(Testimony of George F. Paul.)

and defendant's file was sent, on November 20, 1942, to State Headquarters, Selective Service System, Plaza Building, Sacramento, California, accompanied by a letter of transmittal (U.S.Exh.5), for transmittal to said Appeal Board. The said Appeal Board thereafter by a vote of 3 to 0 on May 26, 1943, affirmed the said 1-A classification of defendant and returned the defendant's file to Local Board 106, accompanied by transmittal letter (U.S.Exh.6), defendant being notified of said decision on June 12, 1943.

U. S. EXHIBIT No. 4

Local Board 106
San Mateo County
Schaberg Bldg.
Redwood City, Calif.

Gentlemen:

I desire to appeal from your ruling classifying me 1-A under the Selective Service Act on the ground that I should have been classified 4-E.

Very Truly Yours,

JACK W. BAGLEY.

[Endorsed]: Filed 9/28/43.

(Testimony of George F. Paul.)

U. S. EXHIBIT No. 5

Appeal Board
State Headquarters
Selective Service
Plaza Bldg.
Sacramento, Calif.

Gentlemen:

Enclosed herewith are the files of the following
named registrants of our board.

756	Walter Harry Nordstrom
1077	William Marvin Parkes
S-2011	Logan Holbrook Potter
10481	Wesley J. Curry
11213	Clayton William Buckley
11838	Jack Woodhouse Bagley

very truly yours,

GEO F. PAUL,

Clerk

GFP:ER

Enc.

[Endorsed]: Filed 9/28/43.

(Testimony of George F. Paul.)

U. S. EXHIBIT No. 6

State Headquarters Selective Service
State of California
Plaza Building
Sacramento

November 28th, 1942

Appeal Board No. 9

Subject: Appeals, (9-75)

Gentlemen:

Enclosed is the complete file for the registrant named below:

Name	Order No.	L.B.
Jack Woodhouse Bagley	T-11838	106

These files have been entered in the State Docket Book of Appeals and are now forwarded for your consideration.

Very truly yours,

K. H. LIETCH

K. H. Leitch

State Director of
Selective Service

[Endorsed]: Filed 9/28/43.

On July 3, 1943, Local Board 106 sent defendant an order (U. S. Exh. 8) to report for induction into the land or naval forces of the United States on July 17, 1943. On July 16, 1943, [19] defendant wrote and sent to said board a letter (U. S. Exh. 7)

(Testimony of George F. Paul.)

protesting his 1-A classification and demanding a 4-E classification. Defendant did not comply with the July 3rd order to report for induction and on July 17, 1943, said Local Board 106 sent a notice of delinquency, DSS Form 281, (U. S. Exh. 9) to defendant.

U. S. EXHIBIT No. 7

July 16th, 1943

Redwood City, California

Local Board 106

San Mateo County

525 Marshall Street

Redwood City, California.

Gentlemen:

I cannot report for induction July 17th, because altho I have been refused a 4-E classification as a Conscientious Objector, I am still against the use of force as a substitute for intelligent right thinking and intelligent right action. You can reach me any time at my present address and I will be only to happy to appear at your request; but not for induction.

Sincerely Yours,

JACK W. BAGLEY.

Signed

[Endorsed]: Filed 9/28/43.

(Testimony of George F. Paul.)

U. S. EXHIBIT No. 8

Prepare in Duplicate

(Cut)—Selective Service System

(Date of mailing) July 3, 1943

(Local Board Date Stamp With Code)

ORDER TO REPORT FOR INDUCTION

The President of the United States,

To (First name) Jack (Middle name) Woodhouse
(Last name) Bagley

Order No. 11838

Greeting:

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the armed forces of the United States, you are hereby notified that you have now been selected for training and service in the (Army, Navy, Marine Corps) Land or Naval forces

You will, therefore, report to the local board named above at (Place of reporting) 525 Marshall St. Redwood City at (Hour of reporting) 6:45 A. m., on the 17th day of July, 1943

This local board will furnish transportation to an induction station of the service for which you have been selected. You will there be examined, and, if accepted for training and service, you will then be inducted ~~into the stated branch of the service.~~

Persons reporting to the induction station in some instances may be rejected for physical or other rea-

(Testimony of George F. Paul.)

sons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and subjects the violator to fine and imprisonment.

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

Member or clerk of the local
board.

D. S. S. Form 150
(Revised 7-13-42)

[Endorsed]: Filed 9/28/43.

(Testimony of George F. Paul.)

U. S. EXHIBIT No. 9

NOTICE OF DELINQUENCY

(Cut)—Selective Service System

Local Board No. 106 91

San Mateo County 081

Jul 17 '43 106

Schaberg Building

Redwood City, California

(Local Board Date Stamp with Code)

(Date) July 17th 1943

To (First) Jack (Middle) Woodhouse (Last) Bag-
ley

Order No. 11838

Dear Sir:

According to information in possession of this local board, you have failed to perform the duty, or duties, imposed upon you under the selective service law as specified below.

() To present yourself for, and submit to, registration.

() Failed To Report For Induction*
(Specify other)

You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this local board, on or before (Hour) 5 P. m., on the 22 day of July, 1943

Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both.

GEO. F. PAUL

~~Member or~~ Clerk of the Local Board.

[*Printer's Note: This line was written in long-hand.]

(Testimony of George F. Paul.)

This form shall be made out in quadruplicate. The local board shall send the original to the suspected delinquent at his last-known address and one copy to the State Director of Selective Service. The date of mailing shall be noted on another copy, which shall be filed. The local board shall post a copy in a conspicuous place for public inspection, and whenever practicable, shall give the information the widest possible publicity.

D. S.S. Form 281

(Revised 9-1-42)

[Endorsed]: Filed 9/28/43.

The day after defendant failed to report for induction I telephoned to him and told him he had failed to report and asked him to come down and he informed me that he didn't think he would show up. The defendant did not show up and I don't think he answered his Notice of Delinquency. I don't remember. In any event, he never came in person to the Board after that.

Further Cross-Examination

Defendant's Exh. A, a letter sent by defendant to Mr. Scott, the government's Appeal Agent, requesting that an appeal from his 1-A classification be taken, which refers to U. S. Exh. 3-B was filed with Local Board 106 on October 27, 1942. I don't know whether Local Board 106 did anything or took any action on Defendant's Exh. A after receipt thereof. Local Board 106 has in its files a report (Defs. Exh. C) from Hugh McKevitt, Hearing Officer,

(Testimony of George F. Paul.)
containing his findings of fact and conclusions. Local Board 106 received defendant's letter, dated June 23, 1943, (Defendant's Exh. B) requesting a hearing by said board for reclassification as 4-E but said Board took no action thereon.

DEFENDANT'S EXHIBIT A

Redwood City, Calif.

October 27th, 1942.

Dear Mr. Scott:—

Will you please file these more explicit answers to questions in Form 47 ~~#~~ for Conscientious Objectors with the information which you now have.

Yours Very Truly,

JACK W. BAGLEY.

[Endorsed]: Filed 9/28/43.

DEFENDANT'S EXHIBIT B

11838

Redwood City, California.

June 23rd, 1943

Local Board 106
San Mateo County
525 Marshall Street
Redwood City, California.

Gentlemen:

I am writing to Major-General Lewis B. Hershey requesting that he appeal my case to the President.

I am respectfully submitting a request to you for a stay of induction until such time as I can receive

(Testimony of George F. Paul.)

a reply from Major-General Hershey. I hope that you will accord me your co-operation in granting a stay of induction.

Respectfully Yours.

JACK W. BAGLEY

Signed.

Request For Presidential Appeal

By Conscientious Objector

Redwood City, Calif.

June 23rd, 1943.

Major-General Lewis B. Hershey
National Director of Selective Service
21rst. and C Streets N. W.
Washington, D. C.

Dear Sir:

I am a Conscientious Objector. I have taken the necessary steps appealing for a IV-E Classification. I have been classified I-A by the Appeal Board.

Life is a gift of God. I have no right to take life. This is my deepest conviction. I believe in the Brotherhood of Man and that only through Love can we ever have a peaceful world. Love destroys hate. Good destroys evil. I believe that there are certain fundamental Universal Laws that govern Mankind and until we recognize these laws we will continue living in chaos. I have a vision of a world free from poverty and war. I will do any constructive work under civilian direction.

The Hearing Officers Report states that my

(Testimony of George F. Paul.)

mother has put all these ideas in my head. My mother and father are unusually intelligent well informed people. I have been ill a greater part of my life. That is the reason my mother has had to spend so much time with me. While attending school I could not take an active part in Scholastic activities or sports. Consequently I had an inferiority complex.

I want to state that I am sincere in my stand and that I feel that none of my past life has any bearing whatsoever on the fact that I cannot take human life or affiliate myself with the Armed Forces.

I am sending a digest of the Hearing Officers Report and rebuttal to the evidence found therein.

I respectfully submit a request for you to appeal to the President in my behalf and grant a stay of induction while my case is reviewed.

Thanking You,

JACK W. BAGLEY

Signed

[Endorsed]: Filed 9/28/43.

(Testimony of George F. Paul.)

DEFENDANT'S EXHIBIT C

11838

REPORT OF HEARING CONDUCTED BY
THE DEPARTMENT OF JUSTICE PUR-
SUANT TO SECTION 5(g) OF THE
SELECTIVE TRAINING AND SERVICE
ACT OF 1940.

IN RE: JACK WOODHOUSE BAGLEY
(CONSCIENTIOUS OBJECTOR)

Appeal From

Local Board No. 106

Redwood City, San Mateo County, California

Appeal Board No. 9

San Jose, Santa Clara County, California

File No. 25-4721

25-9962

Preliminary Statement

Name and Present Address of Registrant:

Jack Woodhouse Bagley

2924 Jefferson Avenue

Redwood City, California

Questionnaires Filed:

D. S. S. Form 40—August 25, 1942

D. S. S. Form 47—August 27, 1942

Nature of Claim for Exemption:

From both combatant and noncombatant mili-
tary service.

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

Action by Local Board:

Classified as 1-A.

Action by Board of Appeal:

Board of Appeal has reviewed the file of registrant and has determined that the registrant should not be classified in Class I-C, Class IV-F, Class IV-D, Class IV-C, Class IV-B, Class IV-A, Class III-B, Class III-A, Class II-B, Class II-A, or Class I-H, December 16, 1942.

Date File Received by Department of Justice:

December 17, 1942.

Date File Received by Hearing Officer:

March 10, 1943.

Date of Giving Notice of Hearing:

March 11, 1943.

Hearing Held Pursuant to Notice:

At Room 449, Post Office Building, 7th and Mission Streets, San Francisco, California, on March 23, 1943.

Registrant personally appeared at the hearing in response to the notice mailed him, and was accompanied by his father and mother.

STATEMENT OF FACTS

1. Registrant was born on July 29, 1920 in Cleveland, Ohio. His education consisted of eight years of elementary school, three and one-half years of high school, and three months of a shipfitting

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

course. Registrant is presently employed by the Peninsula Chevrolet Company in Palo Alto, California.

2. The hearing developed the following facts:

Registrant stated that he is not a member of any church at the present time; that he was baptized into the Methodist church when he was a baby, but has not attended this church for a year; that prior to coming to California, he had attended this denomination about once a month. Registrant further stated that he is not willing to accept noncombatant service, for the reason that he does not believe in war and sees no reason for it. In view of the fact that the record shows that registrant worked for Bethlehem Steel Company in San Francisco, the Hearing Officer questioned registrant as to how he reconciled his working in an industry directly connected with the war effort with his claims as a conscientious objector to both combatant and noncombatant military service. The registrant replied that, "they paid pretty good money", and "I had to work some place".

Registrant was accompanied at the hearing by his mother. This witness continually interrupted the Hearing Officer when he was questioning registrant, and would not permit registrant to make his own statements as to his beliefs or claims. When the Hearing Officer was asking registrant about his work in defense industries, this witness interrupted and stated that although registrant worked there,

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

he could not stand it because the work was abhorrent to him, and quit this work on different occasions, but went back because this work was the only kind available.

She further stated that the family had at one time been members of the Methodist Church, but they dropped out of this church because they "have not been satisfied with the church leadership anywhere, because too much hypocrisy has entered into church leadership". She further stated, "We, as a family, believe in the Golden Rule and Christian principles, and our record in that regard can be looked into." This witness further said that she feels that one does not have to regularly attend a church to have Christian principles.

This witness interfered with all questions asked by the Hearing Officer, and attempted to dominate the trend of the entire hearing. She demanded to know what recommendation the Hearing Officer would make of this case. When the Hearing Officer replied that his recommendations were confidential, she said "I have a right to know what goes on". She further demanded to be told what disposition Washington, D. C. would make of the case, and from whom in Washington she could obtain this information.

Registrant's father testified that registrant had been raised in a Christian home, and had been taught Christian principles.

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

Registrant submitted two affidavits at the hearing, copies of which are attached to this report.

3. A review of the investigative report of the Federal Bureau of Investigation in this case is as follows:

An informant, a former neighbor, reported that he was a neighbor of the registrant and his family for ten years or more until 1934 when the registrant's family moved from that neighborhood; that during the period of residence, the registrant was a small boy and nothing was known concerning him, except that he appeared to be quiet and very much confined by his mother; that at this time the registrant was reported to be suffering from a nervous disorder and it was for this reason that the registrant did not associate with the other children in the neighborhood; that the family was well thought of and never to informant's knowledge did they profess any strong religious tendencies; that informant never heard the registrant's parents state any particular views in regard to war and allied subjects.

Another informant, a close friend of the registrant's family for a number of years, and since 1934, when the registrant's family moved to California, has carried on a correspondence with registrant's mother, states that registrant's mother reveals an anti-war attitude in her letters; that the letters written by registrant's mother were almost entirely devoted to the explanation of registrant's

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

attitude. Informant stated that she had seen registrant about a year ago and that he was a rough and blustery type of individual and at that time expressed no objections to the war nor to the Selective Service Act; that registrant's father was reported to have written a strongly worded pacifistic poem about two years ago and mailed this to informant; that it is the opinion of informant that the registrant's present stand is a result of his mother's and father's influence.

Another informant, a former neighbor, reported that registrant and his family, although attending the local Methodist church, were never known to be more than average church-goers; that registrant's father impressed informant as being "peculiar"—informant was unable to specify particulars in this regard; that never at any time to informant's recollection was war a topic of conversation between him and the registrant's parents; that the local reputation of the registrant's family was good.

An informant was acquainted with the registrant's father when the family resided in Berea, Ohio, and stated that the father of the registrant was known to informant as a satisfactory member of the community and never gave any indication of any pronounced religious tendencies or theories in regard to war.

Another informant, principal of the Berea High School, produced the school record of the registrant covering his two years of attendance at this high

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

school. Informant has no personal recollection of the registrant but faintly remembers the family. The records did not reveal that the registrant had ever had any disciplinary action taken against him by school officials and at that time the registrant was excused from a physical education course for physical reasons. The family of the registrant was remembered by informant to have been responsible members of the community.

The record of the Berea Police Department failed to reflect the name of the registrant.

Another informant, Columbia Center, Ohio, is an aunt of the registrant and also a former employer. She stated that registrant worked and lived in Columbia Center for two years up until some time in 1941, and her first remark upon being confronted by the agent was one of deep dismay that her nephew had taken this stand and stated, "It is all his mother's fault." Then informant went on to report that the registrant and his family have always had a deep feeling against war because the grandfather of the registrant had been injured in the Spanish-American War and remained an invalid the rest of his life and this fact has preyed upon the minds of the registrant and his family, and in the opinion of informant, it is responsible for the family's feeling regarding war services; that registrant was never a religious type. Informant visited the registrant and his family in San Fran-

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

cisco about a year ago when the registrant was employed as a ship fitter in a ship building company. She further stated that at that time the registrant spoke against his job, saying he was "building instruments of war and did not like it," and he expressed the desire to quit; that she believes the registrant is wholly sincere in the stand he has taken.

An informant, who is listed as an employer of the registrant, stated that he had never employed the registrant; that the registrant used to come to his garage and tinker around with machinery there, but he was never considered an employee; that registrant was reported to have stated that he did not think he would have to go to war; he would get out of it on the ground of his being a farm worker or because he was physically unfit; that so far as informant knew, the registrant never expressed any objections to war nor was he at all religious; that he was quite surprised to hear the registrant had made such a claim. The informant said that while in Columbia Center the registrant never had any trouble, nor was he ever seen to use force in any manner.

Another informant who operates the general store at Columbia Center, knew the registrant while he was working on his aunt's farm a couple of years ago and stated that registrant was a rather bragging type of individual who talked much concerning his own ability to do things; that no religious leanings were ever displayed by the registrant to

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

informant's knowledge; that informant, who is also the constable in this community, reported that registrant has never had any trouble with the law enforcement officials there.

An examination of the files of the Redwood City Police Department divulged that registrant's parents were members of the Mankind United Organization and that his mother held the rank of a captain. The Police Department records also contained the registrant's name as a possible suspect in a theft of an automobile aerial which occurred two years ago, but no disposition of the case could be found. An examination of the records of the Sequoia High School at Redwood City divulged that registrant was a very poor student and was expelled for cutting classes and his card contained the following notations: "Mother hovers him too much;" "Has been ill when young;" "Needs social adjustment;" and "Takes no part in class activity."

An informant stated he had been acquainted with registrant since 1934 when he entered the Sequoia High School and described him as bull-headed and as objecting to any established order, regardless of what its purpose might be; that he was a bully type boy and considered very lazy and very insincere in any stand he might take as a conscientious objector to serving in the war; that he was not surprised at all as he did not know of anything which this boy at one time or another had

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

not objected to; that he could not say for certain that registrant had not attended any church during the past year or year and one-half, but felt that all the registrant's school troubles were due to the fact that his mother continually interfered.

Another informant stated he was well acquainted with registrant and believed him to be unstable and of a very flighty nature; that registrant was not a deep thinker and informant was very surprised that registrant was a conscientious objector as he had never evidenced any interest in social problems and he had been only concerned with his own welfare; that he doubted very seriously that registrant had any motive other than self-preservation in taking this stand.

An examination of the records of Alameda High School disclosed that registrant had attended there from January 28, 1935 to September 10, 1937; that he was a very poor student and had an above average I. Q. At the Alameda High School, an informant stated that registrant was considered a "problem" and felt that he would be a liability to the Armed Forces as his morale was very low and he was unable to take discipline of any type; that he had never evidenced any religious convictions and in fact had had no convictions towards anything other than the "path of least resistance." Informant further stated that objecting to war was entirely in keeping with registrant's nature, but that she felt his objection would be based on the

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

fact that most other young men were serving their Country, and that registrant by nature refused to do anything that was "in the established order."

An informant stated that there was no doubt in her mind that registrant's stand as a conscientious objector was derived from his mother's interest in the Mankind United Organization, and that any statements registrant might make were put in his head by his mother who distributed Mankind United Pamphlets throughout the community and had made such statements as "some people have too much money", and "The monied men caused this war;" that on several occasions, she had heard registrant call his mother very vile names when she has disagreed with him on a minor matter and remembered one occasion when registrant and mother were having some disagreement, registrant called his mother several particularly vile names and then backed his car out of the driveway so fast that he ran off the road and into the adjoining field; that registrant had been in the C.C.C. camp at one time, but his mother had obtained his release as she felt that the work of blazing trails was too strenuous for her son.

Another informant stated she had no opinion concerning registrant's stand as a conscientious objector and did not know the family very well, but had heard registrant curse his mother very vilely several times.

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

An informant stated that registrant's mother had contacted her several times to interest her in the Mankind United Organization but came so often and talked so much that it interfered with informant's normal household duties and she had to slight informant's mother to get rid of her; that she was positive registrant had no religious convictions or affiliations, and that his beliefs were derived from his mother's teachings against the present United States Government and its methods of operation.

Another informant stated that registrant and his mother had come to him and advised that they were filling out a conscientious objector's questionnaire for the registrant and warned him that there would be an FBI agent contacting him in the future in an attempt to "cross him up", and asked that informant be particularly careful that he say nothing that would hurt the boy's chances of obtaining war deferment. The informant was very reluctant to give further information.

An informant stated that he was well-acquainted with registrant and his mother and was positive registrant had no convictions of his own, and that his mother had counseled him in the filling out of his Form 47; that the boy in his opinion was a "no good" and the mother a "crackpot", who continually preached that "something was going to happen", and insinuated that it might be in a revolutionary form; that he felt for a long time that

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

this family should be investigated as he felt them to be very poor Americans, and that he would not doubt that they were engaging in some form of un-American activity; that he felt registrant's mother to be a "nuisance." Informant stated he had signed a testimonial to registrant's sincerity of belief as a conscientious objector but had done so under extreme pressure and with great misgivings.

The head of the shipfitting department of the Steel Company, San Francisco, California, stated that registrant had been employed there from September 22, 1941 to June 30, 1942, and again from August 7, 1942 to November 7, 1942, and his employment was terminated due to illness; that registrant worked as a machinist helper in the construction of naval cruisers and added that this branch of the Bethlehem Steel Company was engaged chiefly in manufacturing naval vessels and added that registrant's rate of pay had been \$1.07 per hour; that this type employment was unusual for a conscientious objector as it was actually working for the Navy, except at a better rate of pay, and he did not feel any of his workers could be sincere conscientious objectors.

FINDINGS OF FACT

The Hearing Officer can find nothing in the record to sustain registrant's claim as a conscientious objector. The people contacted by the Federal Bureau of Investigation reported that he had never

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

manifested any actions of a religious person. He stated that he does not now attend any church, nor did he profess to any religious doctrine upon which he bases his beliefs. The investigative report of the Federal Bureau of Investigation shows that his mother is actively working for the organization "Mankind United", and these informants state that he probably obtained his conscientious objector beliefs from this organization and the influence of his mother. It is to be noted, that at the hearing neither registrant or his mother mentioned any connection with the organization "Mankind United". Registrant has not exhibited any religious tendencies in the conduct of his daily life.

CONCLUSIONS

The Hearing Officer finds that registrant is not "by reason of religious training and belief" opposed to either combatant or noncombatant military service, and therefore recommends that the appeal of registrant be not sustained, and he be retained in classification 1-A.

Dated: March 25, 1943.

HUGH K. McKEVITT,

Hugh K. McKevitt

Hearing Officer.

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

Redwood City, Calif.

March 20, 1943

To Whom It May Concern:

I have known Mr. John W. Bagley, Jr. for one and one half years. He comes from a family of high ideas and who, for humanitarian as well as Christian beliefs, object to war or the taking of human life in any manner.

Due to the training by his parents, Mr. Bagley, Jr. is living, as best he can, his life in a Christian-like way.

I am happy to have the opportunity to state that I believe he is absolutely honest and sincere in all statements and actions made by him in the stand he is taking as a conscientious objector.

L. D. BULLIS,

449 Jackson Ave., Redwood
City, Calif.

Acknowledged.

March 17, 1943

To whom it May Concern:

This is to certify that I, the undersigned, E. S. Taylor, have known Mr. Jack W. Bagley, of 2924 Jefferson Ave., Redwood City, Calif., for the past two years, and believe him to be of excellent moral character, sober, industrious, and with a sincere belief in the divine law of brotherhood.

I am sure that with such belief, he would find it impossible to willfully harm his fellow man. I also believe him to be of great courage—as I know

(Testimony of George F. Paul.)

Defendant's Exhibit C—(Continued)

the stand he has taken requires much more moral courage, than would acquiescence in the demands made upon him.

Signed E. S. TAYLOR,
RFD Box 317-A, Menlo Park,
Calif.

Subscribed and sworn to.

[Endorsed]: Filed 9/28/43.

Counsel for the respective parties thereupon stipulated as follows:

“When a registrant who claims to be a conscientious objector appeals from the decision of the local board, the case goes to the Board of Appeal. The appeal board first decides whether or not the registrant is entitled to any other classification other than a conscientious objector. If not, the file is thereafter sent to the United States Attorney's office, which in turn transmits it to the Federal Bureau of Investigation. The Federal Bureau of Investigation makes *makes* its investigation, and that after such investigation, the file, together with the FBI report, is transmitted to a hearing officer. The Hearing Officer, after calling in the registrant and his witnesses, after a hearing, makes his recommendation to the Department of Justice as to whether or not registrant is entitled to a conscientious objector classification. The Department of Justice then makes its [20] recommendation to the

(Testimony of George F. Paul.)

Board of Appeal as to whether registrant is entitled to a conscientious objector classification.”

TESTIMONY OF JOHN A. COST

John A. Cost, produced as a witness on behalf of the United States, being first sworn, testified as follows:

I am a special agent of the Federal Bureau of Investigation. On July 29, 1943, at Redwood City, California, I had a conversation with the defendant in the presence of Kyle Tacett who is a special agent of the F. B. I. At said time and place the defendant stated that he had registered and had received a 1-A classification; that he had appealed therefrom and that he was classified as 1-A after said appeal; that he had received his order to report for induction on July 17, 1943, but that he had not reported; that the chairman of the local draft board telephoned him two days later and asked him if he intended to report and that he said he had no intention of so doing because he was conscientiously opposed to it. I asked him if his claim were true why he previously had worked for the Bethlehem Steel Co. and he said he knew that he had been wrong but that he needed money to contribute to Mankind United. I asked him what the basis of his conscientious objection was and he stated that some resulted from his mother's teaching, some from his own ideas, and some of his ideas from Mankind United.

TESTIMONY OF ARTHUR V. SWIFT

Arthur V. Swift, produced as a witness on behalf of the United States, being first sworn, testified as follows:

I am and ever since October, 1940, have been chairman of Local Board 106. After defendant had originally been classified 1-A he was never again classified. Local Board 106 never reopened defendant's case and never granted defendant a new classification and the defendant never presented any new evidence for consideration by the board relating to his classification [21] on October 5, 1942, or ever. Said local board did not reconsider the defendant's claim for classification 4-E at the time he appeared before said board because he did not submit further information to said board. I do not recall ever having seen U. S. Exh. 3A and 3B and my attention was never called to them and I have no recollection of U.S. Exh. 3B ever having been submitted or considered by Local Board 106 or any of its members. The records indicate that defendant's appeal was not completed, that is, the records were not transferred to the Appeal Board until November 20, 1942. I do not recall ever having seen U. S. Exh. 3B or having acted upon it and I find nothing in the record showing any minutes of any action taken thereon.

Whereupon the plaintiff rested.

TESTIMONY OF JACK W. BAGLEY

Jack W. Bagley, the defendant, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct-Examination

I was born in Cleveland, Ohio, and have been a resident of the State of California since July 1, 1937. In the early part of October, 1942, I wrote and sent to Local Board 106 a letter in which I requested the right of appearing before it. In said letter I also stated that I had signed the clause in the general questionnaire referring to conscientious objectors and wanted to appeal the 1-A classification it had given me instead of the classification to which I believed I was entitled. On or about October 5, 1942, I appeared in person before said board consisting of four members and the secretary thereof. Mr. Paul, a member of the board, told Mr. Swift, a member thereof, at said time that I was a conscientious objector and wanted to appeal my classification 1-A. Mr. Swift stated that I had a constitutional right to do so and he placed the case in the hands of the local appeals agent. Nothing was said by any member of said [22] board to me at said time to the effect that I had the right to present any evidence to said board and I was not then or thereafter given any opportunity to present any evidence to it. No discussion was then had at all about my claim to be classified as a conscientious objector, the interview lasting between five and ten minutes. Thereafter I received in the mail

(Testimony of Jack W. Bagley.)

from Hugh K. McKevitt, Hearing Officer, a letter, (Def. Ex. D), setting March 23, 1943, as the time for a hearing on my classification claim.

DEFENDANT'S EXHIBIT D

Department of Justice

Office of the Assistant to the Attorney General
Washington

Revised October 10, 1942.

INSTRUCTIONS AND DIRECTIONS TO REGISTRANTS CLAIMING EXEMPTION AS CONSCIENTIOUS OBJECTORS

Pursuant to the provisions of Section 5(g) of the Selective Training and Service Act of 1940 and Section 627.25 of the Selective Service Regulations, the Department of Justice is required to make an inquiry and to hold a hearing with respect to the character and good faith of the objections of each registrant whose claim for exemption from training and service under the said Act on the ground that he is conscientiously opposed to participation in war has been denied (or granted) by a local board, and an appeal has been taken to an appeal board.

1. In each instance, the hearing will be conducted by a duly designated Hearing Officer, and the registrant will be duly notified by the Hearing Officer of the place and time fixed for the hearing on his claim.

(Testimony of Jack W. Bagley.)

2. Upon receipt of the notice of hearing by the registrant, and before the date and time set for the hearing, the registrant should communicate in writing with the Hearing Officer and advise whether he will appear at such hearing.

(a) If it is impossible for the registrant to appear on the date and at the time scheduled, he should state to the Hearing Officer in writing the reasons which make it impossible for him to do so, and request postponement of the hearing which, in the discretion of the Hearing Officer, may be granted, and a new date and time scheduled.

(b) If the registrant, without explanation, does not appear for hearing, the Hearing Officer will consider the registrant to have waived his right to hearing, and will proceed to make his recommendation on the basis of the record and evidence contained in the registrant's Selective Service file.

3. If, at the time of receipt of notice of hearing, the registrant no longer desires to be considered as a conscientious objector, he should immediately address a letter to the Hearing Officer stating that he will not appear for hearing and that he desires to withdraw his claim for exemption as a conscientious objector.

4. At the hearing, the registrant, at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence dis-

(Testimony of Jack W. Bagley.)

closed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence.

[Longhand in margin] "Important."

5. At the hearing before the Hearing Officer of the Department of Justice, the registrant will be permitted to make a full and complete presentation of his claim. He may bring with him to the hearing as witnesses any persons who have personal knowledge of facts concerning his religious training and belief and concerning the character and good faith of his objections to participation in war.

6. The registrant may bring with him and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning the registrant's religious training and belief and the character and good faith of his objections to participation in war. Such statements shall be sworn to before a notary public or other person authorized to administer oaths. The registrant may also submit at the hearing any papers or documents, or certified copies thereof, tending to support his claim.

7. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Registrants will not be required to adhere to the ordinary rules of evidence. It

(Testimony of Jack W. Bagley.)

will not be necessary for the registrant to be represented at the hearing by an attorney. The registrant may bring with him a relative or friend or other adviser, who may sit with him at the hearing. Such persons, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under the direction and control of a duly designated Hearing Officer, who may terminate the proceeding upon the violation of these instructions by the registrant or his adviser.

8. Ordinarily, no stenographic record of the oral testimony given at the hearing will be made. However, the Hearing Officer may, in his discretion, have such record made.

JAMES ROWE, JR.,

The Assistant to the Attorney General

NOTICE OF HEARING

<u>San Francisco</u>	<u>California</u>	<u>March 11, 1943</u>
City	State	Date

To: Jack Woodhouse Bagley
 Name of Registrant

<u>2924 Jefferson Avenue</u>	<u>Redwood City</u>	<u>California</u>
Street Address	City	State

You are hereby notified that on March 23rd, 1943,
 Month Day

<u>in Room 449, Post Office Building, 7th and Mission</u>
Building Street Address

(Testimony of Jack W. Bagley.)

Streets, San Francisco, California, at 10:00 o'clock

City

State

Hour

A.M. a hearing will be held by a duly designated officer of the Department of Justice to consider your claim for exemption from training and service under the Selective Training and Service Act of 1940 by reason of your alleged conscientious objection to participation in war. You have a right to be present at such hearing and to present any pertinent evidence in support of your claim.

HUGH K. McKEVITT

Hearing Officer

Hugh K. McKevitt

Address: 1620 Russ Building
San Francisco, California

Answered 3/17/43.

Note: There is enclosed a copy of "Instructions and Directions to Registrants Claiming Exemption as Conscientious Objectors". These instructions should be noted and the directions carefully followed so that your claim for exemption as a conscientious objector may be properly determined.

[Endorsed]: Filed 9/28/43.

In response to said letter I appeared before said Hearing Officer in the Post Office Building in San Francisco, on March 23, 1943, accompanied by my mother and my father. I informed him that

(Testimony of Jack W. Bagley.)

those who accompanied me were my mother and father. He then asked me where I was born, where I worked, where I lived and routine questions like that and why I worked at the shipyards and I told him it paid good money for unskilled labor. Thereupon his examination was concluded. I did not make any further explanation to him as to why I was working in a shipyard and was not given an opportunity so to do. Mr. McKevitt closed the hearing by saying "Good day, folks. Thanks for coming in".

During the hearing my mother asked Mr. McKevitt if there was any evidence against me, to which he replied "No". None of the material which had been introduced in evidence at this trial and which was contained in the report of the F.B.I. was disclosed to me by Mr. McKevitt and he would not let me see it at all. Mr. McKevitt did not tell me that he had any information against me. I did not know of the existence of the report of the F.B.I. until I later started to make my appeal to the President after an adverse ruling had been received by me from the appeal board denying me a classification of 4-E and affirming my classification of 1-A. During the first part of July, 1943, I appealed the 1-A classification to the National Director [23] of the Selective Service System to appeal on my behalf to the President. The first knowledge I had of the contents of said F.B.I. report was when I went to the local draft board and saw it during the first part of July, 1943, when I

(Testimony of Jack W. Bagley.)

was about to initiate my appeal to the National Director, Major General Hershey, by making a request to him to appeal on my behalf to the President. In my letter to the National Director I enclosed a digest of the hearing officer's report (Def. Exh. E).

DEFENDANT'S EXHIBIT E

Copy

Digest of Hearing Officers Report and Rebuttal
Case of Jack Woodhouse Bagley Order No. 11838
Conscientious Objector

The Hearing Officer's Report stressed any evidence disclosed by the investigation which was unfavorable to my claim for exemption as a Conscientious Objector.

It stated that I had not been a regular church goer, had not been to church for over a year, and belonged to no church.

It stated that because of religious training and beliefs, I was not a Conscientious Objector and should not be classified IV-E.

My parents and I were dissatisfied with the attitude of the church towards war and felt that the church had gotten away from Christ's teachings. For the past five years my religious training has come from study of the literature of the Mankind United Movement. From a study of that teaching I can see that the Christ's teaching is the only plan left for man to serve if he is to escape destruction. We believe in the Fatherhood of God

(Testimony of Jack W. Bagley.)

and the Botherhood of Man. In the Golden Rule as our guide. We are against the use of brute force by human beings. Against bloodshed as a substitute for intelligent thinking and intelligent action in the affairs of Mankind. Against intolerance—whether of another Religion, Race or Occupation.

It states that I was expelled from Sequoia Union High School.

That is not true. When visited by my mother the Dean said that I could return to school the next day. ✓

It states that I am only interested in my own welfare and have only taken these steps for self-preservation. That is not true because I have put every cent I could spare into Mankind United to promote peace, because I love humanity.

It was stated that I never expressed any religious inclinations or objections to war. That is not true. I have always talked pacifism. ✓

It states that one of the persons who signed his name as a reference on Form 47, did so under extreme pressure, with great misgivings. That is not true because this person signed willingly and has always taken a kindly interest in me. ✓

It was stated that because I worked in the shipyard I could not be conscientious in my stand. The wages attracted me because they enabled me to increase my support of Mankind United.

It was stated throughout my report that my mother's influence caused difficulties throughout my

(Testimony of Jack W. Bagley.)

life. This statement is not true. Any difficulties I may have had were caused by ill health and my own wrong thinking.

The only good things brought out in my report were that no one had ever seen me use force and if I had taken the stand as a Conscientious Objector I was sincere about it.

Sincerely yours,

JACK W. BAGLEY

Signed

Note: The local Board classified me 1-a without a hearing. When I appealed from their decision I went before the Board and they told me I had the constitutional right to appeal and put my case in the hands of the local appeal agent. (that was all that was said).

I feel that the local board, as well as the Hearing Officer, Hon. Hugh K. McKevitt, should have given me an opportunity to make a full and complete presentation of my claim.

[Endorsed]: Filed 9/28/43.

Cross-Examination

At the hearing before the appeal board, Mr. McKevitt asked me if there was anything inconsistent about my working in the shipyard and claiming exemption from service in the armed forces as a conscientious objector. I replied to him that it was paying big money for unskilled labor. I see

(Testimony of Jack W. Bagley.)

something inconsistent between working on destroyers in the shipyards and being a conscientious objector to going into the service. I felt that putting the money in for something that was good would compensate for working in the shipyards. After writing to the National Director of Selective Service asking him to appeal to the President from my classification of 1-A I did not receive an answer from him and consequently cannot say whether he appealed on my behalf. I know that I could not appeal unless one member of the board of appeals dissents and that no member of the appeal board dissented on my behalf. My religious beliefs, my conscientious objections to going into the service is predicated on home influence, which started from the church. I do not believe my objection to going into the service arose on account of Mankind United, but upon my home training. My home training is not the teaching of Mankind United, but it follows the same trend. Mankind United is not a religious organization, my impression of it being that it^e is a Christian cooperative organization which plans to abolish causes of war and poverty. I do not consider [24] it as a church. I contributed money to Mankind United, turning it into the Bureau Manager, at its office in Redwood City. I do not know to whom, if to anybody, the bureau manager delivers the money. I do not know who is the head of Mankind United.

(Testimony of Jack W. Bagley.)

Re-direct Examination

I would characterize Mr. McKevitt's attitude at my hearing as being more or less bored with the whole thing. I no longer work in a shipyard. I was employed in a shipyard for approximately one year. From the day I started to work there I had hesitation and trouble in my own mind about continuing that type of work, because of my conscientious objection to war and, consequently, terminated my shipyard employment approximately a year ago. I have never seen the F.B.I. report on my case. I saw the report of the Hearing Officer at the office of the Local Board a couple of months after the hearing before him. The Local Board refused to let me see the Hearing Officer's report until I telephoned to State Headquarters and received permission to see it at the Local Board.

Re-Cross Examination

I terminated my employment in August of last year. I received my 1-A classification on Oct. 8, 1942, but I was working in the shipyard on August 25, 1942, when I filled out my Selective Service questionnaire (letter of defendant to Local Board 106 dated Oct. 17, 1942, admitted into evidence as U.S. Exh. 10).

(Testimony of Jack W. Bagley.)

U. S. EXHIBIT No. 10

[Stamped]: Oct 19 '42

10/17/42

Local Board No 106
San Mateo County,
Schaberg Bldg.
Redwood City, Calif.

Gentlemen:—

In reference to Bethlehem Steel Company's report of my termination July 1st 1942, I stopped work because of ill health. I have hired back with the Co. and have been working there since August 7th 1942.

Yours very truly

JACK W. BAGLEY.

[Endorsed]: Filed 9/28/43.

U. S. EXHIBIT No. 11

(Postcard)

Bethlehem Steel Company
20th & Illinois Streets
San Francisco, Calif.
Shipbuilding Division

[Stamped]: San Francisco Calif. Nov 9 '42

Selective Service
Local Board #106
Redwood City, California

(Testimony of Jack W. Bagley.)

11838

[Stamped]: Nov 18 '42

Date Nov 7 1942

Registrant: Bagley, Jack W.

Order No.....

This is to Notify the Board of the Following:

- ☐ Termination of employment effective Nov 7 1942
- ☐ Change of address to 2924 Jefferson Avenue,
Redwood City, Calif.

G. H. ASHLEY

Employment Department

[Endorsed]: Filed 9/28/43.

I quit working for Bethlehem Steel Co. on November 7, 1942. I have never made a claim for deferment from military service on the ground that I was engaged in shipbuilding.

I was given an opportunity to see the report of the hearing officer at the office of the local board in June or July of 1943, a couple of months after hearing was had before Mr. McKevitt. I have never seen the F.B.I. report itself. I was shown the hearing [25] officer's report, after I had first phoned to State Headquarters in Sacramento to obtain permission to see said report. Prior to receipt of said permission the local board refused to permit me to see said report.

TESTIMONY OF URINA BAGLEY

Urina Bagley produced as a witness on behalf of defendant, being first sworn, testified as follows:

I am the mother of the defendant. The defendant has lived with me and my husband, his father, during the whole of his lifetime, with the exception of a short time he spent at the CCC camp. I was present at the time my son, the defendant, appeared before Mr. McKevitt in March, 1943. The persons present were as follows: Mr. McKevitt, his stenographer, my husband, my son, the defendant, and I. Mr. McKevitt asked Jack routine questions as to his name and age and where he was working at that time. My son stated he was then working at the Peninsula Chevrolet in Palo Alto. Then he asked where he worked before that and my son replied the Bethlehem shipyard. Mr. McKevitt asked him why he worked there and my son replied that it paid well, whereupon Mr. McKevitt stated "Well there are other places you could have worked at". He also asked if he went to church and my son replied he went to church occasionally. I told him that I had been a member of the Mankind United; that my husband and I were members of the Methodist Church, but that during the past year or so we had not attended regularly because we were dissatisfied with the attitude of the church leadership in regard to war. I told him we were opposed to war as the way of settling civil and inter-national disputes, and that we felt there were other ways of settling these

(Testimony of Urina Bagley.)

things; that through following Christ Jesus' teachings we could have peace and harmony. Mr. McKevitt told us he had to hurry because he had several other cases. The word "important" written on defendant's Exh. D. is the handwriting of my son, the defendant. [26] Mr. McKevitt did not give my sone a full opportunity to explain his stand, and I asked Mr. McKevitt if he would have an opportunity and if there was anything unfavorable in the F.B.I. report and he said that there was nothing in the report that was unfavorable. I asked Mr. McKevitt twice whether there was anything unfavorable to my son in the F.B.I. report and each time he stated "None".

TESTIMONY OF JOHN W. BAGLEY

John W. Bagley produced as a witness on behalf of defendant, after being first sworn, testified as follows:

I am the father of the defendant; I was present at the hearing held by Mr. McKevitt in March of 1943. Mrs. Bagley, my wife, twice asked Mr. McKevitt if there was anything in the report unfavorable to our son, the defendant. Mr. McKevitt answered "None".

Thereupon defendant offered in evidence defendant's Exh. F., to-wit, a memorandum to Hearing Officers signed by the Attorney General, and which had been marked for identification, to the introduc-

tion of which plaintiff objected. The objection was sustained by the court and defendant excepted thereto. Thereupon the taking of testimony was concluded and the defendant rested.

DEFENDANT'S EXHIBIT F

(For Identification)

Office of the Attorney General

Washington, D. C.

February 11, 1941

Memorandum to Hearing Officers Appointed Pursuant to Section 5(g) of the Selective Training and Service Act of 1940

In conducting hearings with respect to the character and good faith of the objection of those persons who claim that they are conscientiously opposed to participation in war in any form, the Hearing Officer should be governed by the following instructions:

1. As promptly as possible after receipt of such file, the Hearing Officer should make a careful examination of the record, including the Selective Service questionnaire (D.S.S. Form No. 40) and the Special Form for Conscientious Objector (D. S. S. Form No. 47), all affidavits and other documents filed in support of the questionnaire, the report and ruling of the local board, the report of the investigation made by the Federal Bureau of Investigation, and all affidavits and documents accompanying such reports.

2. If the Hearing Officer deems it advisable, he may request the Federal Bureau of Investigation to make a further investigation into such matters pertinent to any case as appears necessary to a complete hearing on the claim and to make a supplemental report covering the additional investigation, or he may confer personally with the local office of the Federal Bureau of Investigation concerning the case.

3. When it appears that a sufficient investigation has been made, the Hearing Officer should fix a time and place for the hearing and mail a notice thereof to the registrant at least ten days prior to the date set for hearing. The form of notice to used should be substantially as follows:

NOTICE OF HEARING

City	State	Date
To: -----		
Name of Registrant		

Street Address	City	State
You are hereby notified that before the under-		
signed Hearing Officer at Room ----, -----		

Building		
Street Address	City	State
at ----- o'clock on -----, 194-----,		
hour	month	day
a hearing will be held, by the Department of Jus-		

tice to consider your claim to exemption from training and service under the Selective Training and Service Act of 1940 by reason of your alleged conscientious objection to participation in war in any form. You have a right to be present at such hearing and to present any pertinent evidence in support of your claim.

Hearing Officer.

Note: There is enclosed a copy of "Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed." You should read these instructions carefully for your information concerning this Hearing and your participation therein.

4. The Hearing Officer should arrange such schedules of hearings within the territory assigned to him as will result in the least expense to the Government without undue inconvenience to the registrant. Whenever practicable the hearings should be held only in places designated for holding terms of United States District Courts.

5. At the time of giving notice of hearing, the Hearing Officer should enclose a copy of "Instructions To Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed." The Hearing Officer should be governed by the provisions contained in such Instructions, a copy of which is attached to this memorandum. In complying with the request referred to in Paragraph 2 of such Instructions, the Hearing Officer

should not reveal to the registrant the source of any confidential information contained in reports of the Federal Bureau of Investigation, or received from any informant. A clear and succinct statement of the facts which will apprise the registrant of the objections raised to granting his claim is sufficient. However, no Hearing Officer should make any finding of facts detrimental to the registrant which is based upon information, the source of which is not disclosed to the registrant.

6. The hearing conducted by the Hearing Officer has for its purpose the ascertaining of information that would aid in determining "the character and good faith of the objections of the person" who claims exemption from combatant or non-combatant service. It will be essential, therefore, to ascertain the truth of all statements made by the conscientious objector, as appear in the above mentioned questionnaires and all affidavits filed by him in support of his claim. From the investigative reports and personal and informal examination of the registrant, the Hearing Officer should endeavor to form a fair but definite opinion of the sincerity of the registrant's alleged convictions and beliefs and the consistency of his daily life with those beliefs. In seeking to determine the sincerity of the registrant's conscientious objection to war in any form, the Hearing Officer should bear in mind that persons who "by reason of religious training and belief" are "conscientiously opposed to war in any form" may be divided into two types:

(a) Those whose conscientious objections are based upon the tenets of a particular church or religious organization, and

(b) Those whose conscientious objections are based upon their own scruples but who do not rely upon adherence to a particular religious doctrine or membership in any church, sect, or religious organization as a basis thereof.

The question in the first class of cases is whether the registrant is a bona fide member of such group or denomination or sect and whether his conduct and mode of life are generally such as to indicate that he is a bona fide believer in its tenets. This group will include member of the so-called "Peace Group" churches (a list of which will be furnished you) as well as members of other denominations, or established churches, the creeds of which are a basis for an individual belief that war is unchristian or ungodly. In the second class of cases the question is whether the registrant individually is conscientiously opposed to participation in war in general and not whether he is conscientiously opposed to participation in a particular war. In seeking to determine the state of mind of the conscientious objector, which may be difficult in the latter class of cases, the Hearing Officer should satisfy himself that the objections of the registrant are based upon a personal religious or ethical conviction, and not upon a political doctrine.

7. The hearing should not be in the nature of a trial or judicial proceeding, but should be in-

formal and no-legalistic without regard to ordinary rules of evidence. It must at all times remain under the direction and control of the Hearing Officer, so as to insure orderliness and dignity. The interest of the registrant may well require that the hearing, in view of its nature and object, be private. It should be so conducted that the rights of the registrant on the one hand, and the rights of his country and fellow citizens on the other, are recognized and protected.

8. If, after considering the record and the evidence which has been introduced at the hearing, the Hearing Officer is not satisfied that all pertinent facts have been disclosed, he may adjourn the hearing to a definite future date, of which fact the registrant shall be advised, and he may request the Federal Bureau of Investigation to make a further inquiry into the specific matters concerning which he is not satisfied.

9. Upon conclusion of the hearing, the Hearing Officer should prepare (1) a statement of findings of fact based upon a consideration of the entire file and record and all the evidence adduced, which statement should include a finding whether the registrant is opposed to participation in combatant service only, or, to participation in service in any form, including non-combatant service, and (2) a proposed recommendation of the Department of Justice to the appropriate appeal board in accordance with the pertinent provisions of Section 5(g) of the Selective Training and Service Act of 1940. The Hearing Officer should then forward

the entire file and record, together with the original and two copies of the findings of fact and the proposed recommendation, to the Assistant to the Attorney General at Washington, D. C.

ROBERT H. JACKSON,
Attorney General.

After oral arguments had been presented to the jury by counsel for the respective parties the Court instructed the jury, giving to the jury all of the instructions proposed by plaintiff and none of those proposed by the defendant.

Defendant duly excepted to the Court's refusal to give defendant's complete proposed Instructions Nos. 1 to 15 inclusive to the jury and excepted to the giving to the jury of plaintiff's proposed Instructions Nos. 4 to 7 inclusive, and said exceptions were duly noted by said Court. The exception was noted in the following manner:

"Mr. Wirin: May I take exception to the instructions before the jury retires?

The Court: An exception to those instructions not given?

Mr. Wirin: And also to certain instructions given; instructions No. 4, 5, 6 and 7, as proffered by the Government and given by the Court.

The Court: Note an exception, Mr. Reporter, to those instructions.

The jurors will retire." (Tr. line 30, p. 87 through line 8, page 88). [27]

The following are the complete number of instructions requested by defendant which were refused by the Court and to which refusal exceptions were timely taken by defendant and noted by the Court, to-wit:

"No. 1. You are instructed that the Selective Training and Service Act of 1940, as amended (5(g)) provides for exemption from military service those who by reason of religious training and belief conscientiously are opposed to participation in war in any form, if their claims are sustained.

Any person who is found by the Selective Service agencies to be conscientiously opposed to participation in war in any form is to be assigned to work of a national importance under civilian direction, in lieu of induction into the armed forces.

You are further instructed that there has been set up numerous civilian public service camps throughout the country, to which camps such conscientious objectors are assigned to perform work of national importance.

You are further instructed that Selective Service Regulations, paragraph 622.51 provides that registrants who are found by the Selective Service agencies, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combat and noncombatant military service are to be classified as IV-E.

You are further instructed that in the event that a local draft board refuses to grant a IV-E classification to a registrant, the registrant has a right

of appeal. That in the event the registrant takes such appeal, the Selective Service Regulations further provide (627.25) that the department of justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant; and that the registrant shall be notified of the time and place of [28] such hearing and shall have an opportunity to be heard.

You are further instructed that an opportunity to be heard includes an opportunity furnished to the registrant to know the nature and import of any evidence in the possession of the hearing officer adverse to the registrant, so that the registrant may be afforded the right and opportunity to meet or otherwise refute such adverse evidence.

You are further instructed that a finding by a hearing officer, or a recommendation by a hearing officer based upon evidence or information not made known to the registrant and without affording the registrant an opportunity to meet or refute such evidence, is not in accord with due process of law, and makes such finding or recommendation arbitrary and capricious; and a hearing resulting in such findings or recommendation is not a fair hearing as required by due process of law.

No. 2. That defendant is charged with having "knowingly and feloniously" failed and neglected to comply with an order of his local draft board, No. 106, to report for induction into the Land and Naval forces of the United States, as provided in the Selective Training and Service Act of 1940,

as amended, and the rules and regulations made pursuant thereto. The burden is upon the Government to prove that the defendant failed to report as ordered in each of these particulars.

The word "feloniously" means done with an evil heart or purpose; with a wicked intent; malicious, villainous or perfidious. It means an act done with intent to commit a crime, with a mind bent on that which is wrong.

If you find that the defendant did not feloniously fail to comply with the order of the board to report for induction, or if you find that there is a reasonable doubt as to whether the defendant feloniously failed so to report, you will find the defendant not guilty. [29]

No. 3. You are instructed that a registrant is not required to comply with an order of a local board or of any other Selective Service agency if such order is void or unlawful.

You are further instructed that if you find that the defendant has violated no lawful order of his local board or any other Selective Service agency, you are to acquit the defendant.

No. 4. You are instructed that although under the Act, the decision as to what classification a particular registrant is to receive is left to the local board, this does not mean that a court of law does not have the power nor that you as a jury do not have the power to review a classification.

This review is limited, however, to a determination by the jury of the facts, subject to the limitations to be indicated by the Court in later instruc-

tions, that constitute arbitrariness or capriciousness, denial by the draft board of a fair hearing, or violation by the draft board of the provisions of the Selective Training and Service Act, or the Rules and Regulations adopted pursuant to the Act.

No. 5. You are instructed that Local and Appeal Boards under the Selective Service System must not act in an arbitrary or capricious manner. Classifications by such boards must be based upon the evidence before them and that evidence alone.

If you find that the local and appeal boards in this case acted in an arbitrary or capricious manner or disregarded the evidence that was before them or failed to give the registrant, defendant here, a full and fair hearing, you will acquit the defendant and find him not guilty.

No. 6. You are further instructed more particularly that if the order of the local or appeal boards in classifying the defendant or the recommendation of the hearing officer was made arbitrarily or capriciously, or was the result of passion or prejudice; or was made in disregard of the evidence presented to [30] it, or if there was not substantial evidence to sustain the findings of said agencies; or if the defendant was denied any hearing at all; or was denied a full and fair hearing, the order of the local or appeal board in ordering the defendant to report for induction into the armed forces, or the recommendation of the hearing officer resulting in said order, was an illegal order

since it was made as a result of the deprivation of the defendant in his rights of due process of law.

It is for the jury to determine the facts as whether any of the above took place in the case of the defendant.

No. 7. You are instructed that under the Rules and Regulations of the Selective Service system a registrant who objects to a classification given him by a local draft board, has the right to request a personal appearance and hearing before said local board; that the registrant at said hearing is entitled to present evidence or information to the board supporting his claim for a classification, and is entitled to have said evidence heard and considered by said local board.

You are further instructed that if a local board refuses to permit a registrant to produce such evidence, or if a local board refuses to consider said evidence, that said hearing violates due process of law; is arbitrary and capricious and an order resulting from such a hearing is void.

No. 8. The denial of a full and fair hearing is the same thing as the denial of any hearing. Therefore, if you find that although the defendant was granted a hearing either by the local board or the hearing officer, if either of those hearings was not a full and fair one, but was merely perfunctory and was not in accord with the ordinary rules of decency and fair play, or not in accord with the Selective Service System Rules and Regulations, you will find the defendant not guilty.

No. 9. If you find that there was not substan-

tial evidence [31] before the local and appeal boards to sustain the finding that defendant should be classified as he was, you will find the defendant not guilty.

By substantial evidence is meant a large quantum of evidence. It does not mean an absence of evidence and it means more than just a scintilla or some evidence. It means that there must be enough evidence before the boards so that a reasonable man in the same circumstances as presented in this case would come to the same conclusion as the boards did.

If there was not enough of such evidence before the local or appeal board, you must acquit the defendant.

No. 10. If you find that the decision of the local or appeal board was arrived at because of passion or prejudice against the defendant or against Mankind United, you will find the defendant not guilty.

No. 11. If you find that the local board acted arbitrarily or capriciously in classifying the defendant as it did, you will find the defendant not guilty.

No. 12. If you find that the local or appeal board, or the hearing officer, disregarded the evidence presented on behalf of the defendant, you will find the defendant not guilty.

No. 13. You are instructed that under the Selective Training and Service Act it is not necessary for a person to be a member of or belong to a church or religious organization in order to be en-

titled to classification as a conscientious objector. Under the present law, conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed.

Religious belief may be defined as a "sense of inadequacy of reason as a means of relating the individual to his fellow men and to his universe"; it finds "expression in a conscience which categorically requires the believer to disregard elementary self- [32] interest and to accept martyrdom in preference to transgressing its tents."

No. 14. Arbitrary power and the rule of the United States Constitution requiring the principle of fair play (legally known as "due process") cannot both exist at the same time. They are antagonist and incompatible forces. Of necessity arbitrary power must perish before the rule of the Constitution. There is no place in our constitutional system of government (and this includes the administration of the Selective Service System) for the exercise of arbitrary power.

No. 15. You are instructed to find the Defendant not guilty."

The following are the complete number of instructions requested by plaintiff which were given by the Court to the jury to the giving of Nos. 4, 5, 6 and 7 which the defendant took timely exceptions which were noted by the Court, to-wit:

"No. 1. The indictment in this case charges that the defendant, Jack W. Bagley, being a male citizen between the ages of twenty and forty-five years, residing in the United States, and under the duty

to present himself for and submit to registration under the provisions of the Selective Training and Service Act of 1940, as amended, and thereafter to comply with the rules and regulations made pursuant thereto, and having in pursuance of said act, as amended, and the rules and regulations pursuant thereto, become a registrant of Local Board No. 106 of the Selective Training and Service System, in the City of Redwood, County of San Mateo, California, which said Local Board No. 106 was duly appointed and acting for the area of which said defendant is a registrant, did, on or about the 17th day of July, 1943, in the City of Redwood, County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, knowingly and feloniously [33] fail and neglect to perform such duty, in that he, the said defendant, having theretofore been classified in Class 1-A, did then and there knowingly and feloniously fail to comply with the order of said Local Board 106 to report for induction into the land and naval forces of the United States, as provided in the said Selective Training and Service Act of 1940, as amended, and the rules and regulations made pursuant thereto.

No. 2. The pertinent portions of Section 11 of the Selective Training and Service Act of 1940, as amended, under which the defendant in this case is charged in the indictment states that any person who in any manner shall knowingly fail or neglect to perform any duty required of him under this act

or the rules and regulations made pursuant to this act, shall upon conviction be punished as the said act provides.

No. 3. I instruct you that in Class 1-A shall be placed every registrant who is found available for general military and naval service, and such registrant shall be liable for induction into the armed forces of the United States.

No. 4. I instruct you that the local boards, under the rules and regulations prescribed by the President, shall have power, within their respective jurisdiction, to hear and determine, subject to the right of appeal boards therein authorized, all questions or claims with respect to inclusion for or exemption or deferment from training and service under the Selective Training and Service Act of 1940, as amended, of all individuals within the jurisdiction of such local board. The decision of such local board shall be final, except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

No. 5. I instruct you that each board of appeal shall have jurisdiction to review any decision concerning classification of a registrant by any local board in the area of the board of [34] appeal, provided that an appeal has been filed with the local board. Such appeal must be taken within ten days after the date when the local board mails to the registrant a notice of classification, Form 57. The decision of the board of appeal shall be final, unless modified or reversed by the President.

No. 6. I instruct you that whether a Selective Service registrant is a conscientious objector presents a question of fact, which from its very nature is committed by the act to the determination of a competent local draft board, and if an appeal is taken, to the determination of the proper appeal board. You as jurors are not to decide whether the defendant is or is not a conscientious objector. What you are to determine is whether the defendant after classification intentionally ignored the draft board's order to report for induction.

No. 7. I instruct you that if you find beyond a reasonable doubt and to a moral certainty that the defendant has been classified in Class 1-A and that he was duly ordered by the Selective Service Local Board No. 106 of Redwood City, California, the Selective Service board with which he was registered, to report for induction into the land or naval forces of the United States, at Redwood City, California, on or about the 17th day of July, 1943, as provided by said Selective Training and Service Act of 1940, as amended, and at that time and place as aforesaid, he knowingly failed and neglected to perform such duty, then you shall find the defendant guilty as charged."

The following instructions to the jury were given by the Court at its own instance:

"(a) The defendant is charged with having knowingly and feloniously failed and neglected to comply with the order of Local Draft Board No. 106 to report for induction into the land or naval forces of the United States, as provided in the Selective

Training and Service Act of 1940, as amended, and the rules [35] and regulations made pursuant thereto. The burden is upon the Government to prove that the defendant failed to report as ordered, in each of these particulars.

(b) The word "feloniously" means with a deliberate intent to do a wrongful act. By the filing of an indictment no presumption whatever arises to indicate that the defendant is guilty or that he has any connection with or responsibility for the act charged against him. The defendant is presumed to be innocent at all stages of the proceeding, until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt; and this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction.

(c) The determination of a charge in a criminal case involves the proof of two distinct propositions. First, that the crime charged therein was committed; and second, that it was committed by the person accused thereof and on trial therefor. These two propositions and every essential and material and necessary fact to prove them or either of them must be established by the Government to a moral certainty and beyond a reasonable doubt.

(d) The defendant is presumed to be innocent, and this presumption has the weight and effect of evidence in his behalf, and continues to operate in his favor until it is overcome by competent evidence. If the evidence introduced does not overcome this presumption of innocence to your satisfaction to a

moral certainty and beyond a reasonable doubt, you must find the defendant not guilty.

(e) It is not necessary for the defendant to prove his innocence. The burden rests upon the prosecution to establish every element of the crime with which he is charged, to a moral certainty and beyond a reasonable doubt. [36]

(f) A reasonable doubt is a doubt resting upon the judgment and reason of him who conscientiously entertains it, from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant merely every possible or fanciful conjecture that may be suggested or imagined. Reasonable doubt is that state of the case, which after entire comparison and consideration of the evidence in the cause, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. A reasonable doubt is not a mere imaginary or possible doubt, but a fair doubt based on reason and common sense, and growing out of the testimony in the case. The jury are the sole and exclusive judges of the value and effect of the evidence addressed to them, and of the credibility of the witnesses who have testified in the case; and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility, and the fact as to whether they have spoken the truth; and the jury may scrutinize not only the manner of the witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is

presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, his interest in the case, if any, or a motive for testifying falsely, if any, or his bias or prejudice, if any, against one or more of the parties, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence.

(g) In judging of the evidence you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict, when were it not for such feeling or bias you [37] would reach a contrary conclusion; and whenever, after a careful consideration of all the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

(h) In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained and any testimony which was ordered stricken out must be wholly left out of account and disregarded.

(i) A verdict of the jury should represent the opinion of each individual juror. It by no means follows that the opinion may not be changed in the jury room. The very object of the jury system is to secure unanimity by comparison of views and

arguments among the jurors themselves. There is nothing particularly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence only for the purpose for which it has been admitted; in the light of your knowledge of the natural tendencies and propensities of human beings resolve the facts according to deliberate and cautious judgment, and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

Jurors are expected to agree upon a verdict when they can conscientiously do so. You are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

Your verdict must be unanimous.

When you retire to the jury room, you will select one of your number as foreman, and he will sign your verdict for you when [38] it is agreed upon, and will represent you as your spokesman in the further conduct of this case in court.

The clerk has prepared a blank form of ballot, and when you have agreed upon your verdict, you may fill in that blank and it may be signed by your foreman. The jury will retire and deliberate upon the case."

At the conclusion of the reading of the instructions to the jury by the Court the jury retired to determine upon a verdict and thereafter on said day returned a verdict of Guilty as charged in the Indictment.

Thereafter on said day, following the discharge of the jury, the defendant moved the said Court for a new trial based upon each and all of the following grounds, to-wit:

“1. That the verdict of the jury abridges the defendant’s freedom of religion guaranteed by the First Amendment of the Constitution of the United States.

2. That it abridges defendant’s liberty without due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and more particularly in the following respects:

3. The evidence discloses that the defendant did not have a fair hearing from the Local Draft Board as required by due process of law and as required by the rules and regulations of the Selective Service System, with particular reference to paragraph No. 625.1 and 625.2 of the Rules and Regulations.”

The said motion being argued at length by counsel for the respective parties and having been submitted to the court for decision the said motion for a new trial was denied, by an order of said court then and there made, to which said order defendant duly excepted.

Thereupon defendant moved the said court in arrest of judgment upon each and all of the grounds stated and urged upon his motion for a new trial

and said motion was then and there denied by an [39] order of said court.

Thereafter on said day said Court sentenced defendant to two (2) years imprisonment in a federal penitentiary to be designated by the Attorney General.

The above Bill of Exceptions contains a recital of all of the evidence, oral and documentary, and all of the proceedings relating to the trial, conviction, sentence and motions made in said action.

Dated: November 15th, 1943.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Plaintiff.

A. L. WIRIN,
THEODORE TAMBA,
WAYNE COLLINS,
Attorneys for Defendant. [40]

Receipt of a copy of the above Bill of Exceptions is hereby admitted this 15th day of November, 1943.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Plaintiff.

STIPULATION

It is hereby stipulated between the parties hereto, by their respective counsel, that the above and foregoing Bill of Exceptions was prepared within the time allowed by law, and as extended by court order, that it represents the bill of exceptions proposed by the defendant and as amended by the plaintiff; that the same is in proper form and conforms to the truth and that it may be settled, allowed, approved and authenticated by this Court as the true Bill of Exceptions on appeal herein and be made a part of the records in said case.

Dated: November 15th, 1943.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,
Attorneys for Plaintiff.

A. L. WIRIN,

THEODORE TAMBA,

W. M. COLLINS,

Attorneys for Defendant.

ORDER

It is hereby ordered that the above and foregoing engrossed Bill of Exceptions, duly presented to this court and agreed to by the respective parties hereto, and which has been presented to the Court within the time allowed by law and the rules and orders of this Court, be and the same is hereby settled,

allowed, signed and authenticated as in proper form and in conformity with the truth and as the true Bill of Exceptions herein, and the same is [41] hereby made a part of the record in this case.

Dated: November 15th, 1943.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Nov. 15, 1943. [42]

[Title of District Court and Cause.]

Bond No. 824—0017

BAIL BOND ON APPEAL

Know All Men By These Presents:

That we, Jack W. Bagley as Principal, and the Northwest Casualty Company, a Washington Corporation, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of Three Thousand Dollars (\$3000.) Dollars, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 29th day of September, 1943, at a term of the District Court of the United States, in and for the Northern District of California, Southern Division, in an action pending

in said Court in which the United States of America is Plaintiff, and Jack W. Bagley was Defendant, judgment and sentence was made, given, rendered and entered against the said Defendant in the above entitled action, whereas he was convicted as charged in the indictment;

Whereas, in said judgment and sentence, so made, given, rendered and entered against said Jack W. Bagley, it was ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the United States, to be designated by the Attorney General or his Authorized representative for a period of [43] 2 years.

Whereas, the said Jack W. Bagley, has filed notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Jack W. Bagley, has been admitted to bail pending the decision upon said appeal, in the sum of Three Thousand Dollars (\$3000.) Dollars.

Now Therefore, the conditions of this obligation are such that if said Jack W. Bagley shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said Jack W. Bagley shall abide by and obey Court orders by the said United

States Circuit Court of Appeals for the Ninth Circuit, and if the said Jack W. Bagley shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said Jack W. Bagley will appear for trial in the District Court of the United States, in and for the Northern District of California, Southern Division, on such day or days as may be appointed for retrial by said District Court, and if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

This Recognizance shall be deemed and construed to contain the "express agreement", summary judgment and execution thereon, mentioned in Rule 34 of the District Court.

JACK W. BAGLEY,

Principal, 2924 Jefferson Ave.,
Redwood City, Calif.

Address. [44]

NORTH WEST CASUALTY
COMPANY, a Washington Corporation.

By A. W. APPEL

[Seal]

A. W. APPEL, Its Attorney-in-Fact.

Surety

Acknowledged before me and approved this 17 day of Nov. 1943.

[Seal] FRANCIS ST. J. FOX,
U. S. Commissioner, Northern Dist. California, at
San Francisco.

Approved as to Form Nov. 16/1943.

FRANK J. HENNESSY,
United States Attorney.

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

THEODORE TAMBA,
Attorney for Defendant and
Appellant.

The foregoing bond is approved this 16th day of November, 1943.

MICHAEL J. ROCHE,
United States District Judge.

State of California,
County of Los Angeles,—ss.

On this 16th. day of November, A. D. 1943, before me, Marva Weede, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared A. W. Appel, Attorney-in-Fact of the Northwest Casualty Company, a Washington corporation, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me fully sworn, deposes

and says that he is the said officer [45] of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles, County of Los Angeles, the day and year first above written.

MARVA WEEDE,

Notary Public in and for the County fo Los Angeles, State of California.

My Commission Expires February 3, 1946.

[Seal of the Notary]

[Endorsed]: Filed Nov. 17, 1943. [46]

[Title of Court and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY ON
APPEAL

Petitioner hereby adopts as his points on appeal the assignments of error included in the petition for review within the transcript of record.

A. L. WIRIN,

THEODORE TAMBA,

W. M. COLLINS,

Attorneys for Appellant.

Received copy this 19th day of Nov. 1943.

FRANK J. HENNESSY,

U. S. Attorney.

[Endorsed]: Filed Nov. 19, 1943. [47]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Appellant in the above-entitled action assigns as error the following:

(1) The giving of instructions by the Court that the decisions of the Local Board are final.

(2) Giving of instructions by the Court that the jury could not determine whether the Local Board or the Appeal Board was right in its determination of the classification of defendant.

(3) The refusal to give instructions 1 to 15 inclusive requested by the defendant.

(4) The giving of instructions 4 to 7 inclusive requested by the prosecution.

(5) The judgment of conviction violates the rights of the defendant to freedom of religion.

Dated this 19th day of November, 1943.

A. L. WIRIN,

THEODORE TAMBA,

W. M. COLLINS,

Attorneys for Appellant.

Received copy of within this 19th day of Nov., 1943.

FRANK J. HENNESSY,
U. S. Attorney.

[Endorsed]: Filed Nov. 19, 1943. C. W. Calbreath, Clerk. [48]

[Title of Court and Cause.]

INSTRUCTIONS TO CLERK RE
PREPARATION OF RECORD

To the Clerk of the Above-Entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to-wit:

1. The Indictment.
2. Arraignment and plea, minute entry thereon.
3. The verdict, judgment, sentence to two years in jail and commitment.
4. Notice of Appeal.
5. Court order of Oct. 14, 1943, fixing time within which to file, serve and settle Bill of Exceptions, and orders extending time thereon (minute orders).
6. Assignment of Errors.
7. Bill of Exceptions.
8. All exhibits introduced into evidence at trial.

9. Order allowing release on bail pending appeal.

10. Bail Bond on Appeal.

11. Statements of Points upon which defendant intends to rely upon appeal and description of parts of record to be printed.

12. This praecipe.

Dated: November 22, 1943.

A. L. WIRIN,

THEODORE TAMBA,

W. M. COLLINS,

Attorneys for Defendant (Appellant).

(Admission of Service.)

[Endorsed]: Filed Nov. 22, 1943. [49]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 49 pages, numbered from 1 to 49, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of *The United States of America vs. Jack W. Bagley*, No. 28056 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Six Dollars and Eighty Cents (\$6.80) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of December, A. D. 1944.

[Seal]

C. W. CALBREATH,
Clerk.

M. E. VAN BUREN,
Deputy Clerk. [50]

[Endorsed]: No. 10574. United States Circuit Court of Appeals for the Ninth Circuit. Jack W. Bagley, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 6, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10574

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

THE STATEMENT OF POINTS AND DESIGNATION
OF PARTS OF THE RECORD

Appellant states that he intends to rely on all the points set out in his assignment of errors.

The appellant hereby designates the following documents to be included in the printed transcript of the record:

1. Indictment
2. Arraignment and Plea
3. Verdict
4. Judgment and Sentence
5. Notice of Appeal
6. Orders Extending Time to Settle and File Bill of Exceptions
7. Bill of Exceptions
8. Assignment of Errors
9. All Exhibits Introduced into Evidence at Trial

A. L. WIRIN,
W. M. COLLINS,
THEODORE TAMBA,
Attorneys for Appellant.

Received copy of the within Statement of Points and Designation of Parts of the Record this 16th day of December, 1943.

FRANK J. HENNESSY,

U. S. Attorney.

[Endorsed]: Filed Dec. 16, 1943. Paul P. O'Brien, Clerk.



No. 10574

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

FILED

MAY 17 1941

COURT HOUSE

A. L. WIRIN and

J. B. TIETZ,

257 South Spring Street, Los Angeles,

Attorneys for Appellant.

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No. 10574

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DEFENDANT'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of conviction of the appellant by the District Court for the Southern District of California, and a jury thereof. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, Subdivision (a), First and Third and Subdivision (d).

Statement of the Case.

The appellant, a conscientious objector, was convicted in the Court below for a violation of the Selective Training and Service Act of 1940 under an indictment [Tr. of Rec. p. 2] which charged that he "did then and there knowingly and feloniously fail to comply with the order of his said Local Board No. 106, to report for induction"

In the Court below and before the Selective Service Agencies, he claimed to be a conscientious objector and that he was entitled to a classification as such under the Selective Training and Service Law.

At the trial it was shown that the appellant had not received a hearing by the Hearing Officer such as the law granted him. Requested instructions on this point proffered by the appellant were refused by the Trial Court. To this rejection the appellant duly excepted. The particular instruction so refused, No. 8, is:

“The denial of a full and fair hearing is the same thing as the denial of any hearing. Therefore, if you find that although the defendant was granted a hearing either by the local board or the hearing officer, if either of those hearings was not a full and fair one, but was merely perfunctory and was not in accord with the ordinary rules of decency and fair play, or not in accord with the Selective Service System Rules and Regulations, you will find the defendant not guilty.”

Questions Involved.

I.

Is this case to be distinguished from *Falbo v. U. S.*?

II.

Was the refusal of the Trial Court to charge the jury as requested by defendant prejudicial error?

Specifications of Assigned Errors to Be Relied Upon.

The Transcript of Record, page 128, contains five assignments of error specified by attorneys for appellant.

The appellant now relies upon No. 3, to wit: The refusal to give instructions 1 to 15 inclusive, requested by the defendant.

ARGUMENT.

POINT I.

The Falbo Case Need Not Control the Case at Bar and Is Distinguishable From It.

The issues of the instant case do not necessarily challenge the *propriety* of the Draft Board's classification of the defendant, nor the Draft's Board's *power* to make any decision within the ambit of the Selective Training and Service Act of 1940.

The challenge of the present case lies in its *procedural failure*, in particular the Hearing Officer's mockery of a hearing, the issue of "due process" thus entering this case:

The defendant, although assured by law a specified and valuable type of hearing [Tr. of Rec. p. 85], did not get it. [Tr. of Rec. pp. 88 to 92.] The law relating to this situation will be argued more fully in Point II of this brief.

We submit the *Falbo* case need not control the Court in any obvious and undebatable instance of an omission of an essential part of the Selective Service procedure. Let us suppose a board sought to expedite the draft procedure by giving a registrant an order to report for induction at the same time he was initially advised of his draft classification. The facts of the instant case do not differ in kind but only in degree with the above imaginary instance of ignoring the draft regulations. This point was made in the opinion in the *Monogahela Bridge Co. v. United States*, 216 U. S. 177, 195, to wit:

"Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary

might be the action of executive officers proceeding under the Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law, for acts, whether done by governments or by individual persons, that violated natural justice or were hostile to the fundamental principals devised for the protection of essential rights of property."

This is also the situation in *Cobbledick v. United States*, 309 U. S. 323, squarely in point, where it is said:

"At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim for his alternatives are to abandon the claim or languish in jail."

Also in *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 301 U. S. 292, 304-305:

"The right to such a hearing is one of the rudiments of fair play . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or cause of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

It has always been the laws that the Courts are not powerless to set aside an administrative determination in

such situations as this where Congress has not provided for judicial review.

Ng Fung Ho v. White, 259 U. S. 276;

Gegiow v. Uhl, 239 U. S. 3;

School of Magnetic Healing v. McAnulty, 187 U. S. 94;

C. R. F. C. v. Bankers Trust Company, 318 U. S. 163.

POINT II.

The Refusal of the Trial Court to Charge the Jury as Requested by the Appellant Was Prejudicial Error.

The 8th requested instruction, was in substance the provisions of Section 5 (g) of the Selective Training and Service Act of 1940 and Section 627.25 of the Selective Service Regulations received in evidence as Defendant's Exhibit B. These sections concerned the instructions and directions to registrants claiming exemption as Conscientious Objectors. These instructions came from the Department of Justice, Office of the Assistant Attorney General. The Court's attention is directed specifically to instruction 4 which reads as follows:

"At the hearing, the registrant at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence."

This procedural regulation was clearly intended as a shield for the defendant. It also serves as one of the means of assuring confidence in the fairness of the mobilization process and in the respect given by our laws to the rights of conscience. This procedural step, one he is entitled to as a matter of right, definitely assures the conscientious objector an opportunity to meet accusations harmful to his assertion of conscience.

To the defendant in the instant case this assurance became a mockery. It is hardship enough to be unable to meet one's accusers face to face. It is worse yet to have no opportunity to deny or explain spiteful, anonymous accusations. Far more contrary to the spirit of our law is the instant situation where a man is promised an opportunity to refute or rebut any unfavorable "evidence" that might exist in the Hearing Officer's file and to be then falsely assured that there was no unfavorable evidence. Among gambling card players, this latter practice is termed "sandbagging."

It is not the ethics of the Government officials involved that is now complained of. Yet, at this point, it is well to recall the remarks of Chief Justice Hughes in *Morgan v. United States*, 304 U. S. 1, who recognized that the:

" . . . Vast expansion of administrative agencies makes necessary that in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

At another point the Court observed:

"If these multiplying (administrative) agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and

endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.”

St. Joseph Stockyards v. United States, 298 U. S. 32, is in similar accord, as is

Yamatoya v. Fisher, 189 U. S. 86.

It is the defendant's claim that when he was denied a hearing of the character and scope promised him by the law he was given no hearing and having been given no hearing, he was denied “due process.”

In the Transcript of Record, pages 88 to 92, we see that first, the Hearing Officer's questions to defendant were few and perfunctory and when asked if there was any evidence against defendant he replied “No.” Second, that Hearing Officer's files actually contained considerable evidence that reflected adversely on the patriotism and sincerity of defendant, as well as indirect reflections on his character by attacks on his school and work record. Appellant did not know of the existence of the reports against him possessed by the Hearing Office until he started his appeal to the President. Then, at the office of the Draft Board he first saw the adverse reports, and, in his letter to General Hershey [Defendant's Exhibit p. 90, Tr. of Rec.] he points out their falsity and lack of foundation. Appellant never had the opportunity to make his denial and explanation to the Hearing Officer.

Denial of a full and fair hearing is the same thing as the denial of any hearing. (*U. S. ex rel. Vajteauer v. Commissioner of Immigration*, 273 U. S. 103; Sec. 623.1 (c) of Selective Service Rules and Regulations.) The denial of the requested instructions concerning lack of a

hearing deprived the defendant of “due process of law” within the meaning of the Fifth Amendment to the Constitution. (*Yamatoya v. Fisher* and *St. Joseph Stockyards v. United States*, cited above.)

The facts raised a material issue to be submitted to the jury.

When the evidence has raised a material issue and the Court refuses to charge the jury concerning it, there is a reversible error.

Weaver v. United States, 173 F. 912;

Gerson v. United States, 88 F. (2d) 358;

United States v. Stilson, 254 F. 120, 125.

Conclusion.

From the procedural provisions cited above it clearly appears that the appellant was entitled to a hearing before the Hearing Officer as a matter of right. It is settled law (*Yamatoya v. Fisher* and *St. Joseph Stockyards v. United States*, cited above) that such a hearing is a part of “due process” in this type of proceedings.

Respectfully submitted,

A. L. WIRIN and

J. B. TIETZ,

Attorneys for Appellant.

No. 10,574

IN THE 3
United States Circuit Court of Appeals
For the Ninth Circuit

JACK W. BAGLEY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

R. B. McMILLAN,

Assistant United States Attorney,

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APR 14 1944

PAUL P. O'BRIEN,
CLERK

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Co., Shipbuilding Division, San Francisco, California, that he had earned \$2761.01 during the past twelve months and that the occupation for which he was best fitted is shipfitting (T. pp. 22-24). Appellant filed a "Special Form for Conscientious Objector" on August 27, 1942 (T. p. 51), in which he stated:

"I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed, by reason of religious training and belief, to participation in war in any form and to participation in any service which is under the direction of military authorities." (T. p. 45.)

In this form appellant stated that he was not a member of any religious sect or organization (T. p. 49), and asserted that,

"I have talked against war to the majority of people that I have come in contact with ever since the war in Europe started." (T. p. 53.)

Appellant also stated to an agent of the Federal Bureau of Investigation that his belief of conscientious objection resulted from his mother's teachings, from his own ideas and from the teachings of Mankind United (T. p. 81). The Local Board rejected his claim and on October 8, 1942 unanimously classified him in Class I-A and mailed him a notice of such classification (T. pp. 41 and 53). The appellant was granted a personal hearing before the members of the Local Board, but the decision of the Local Board remained unchanged (T. p. 83). Thereafter the appellant filed an appeal from the decision of the Local Board to the

Board of Appeal (T. p. 53) and on May 26, 1943, the Board of Appeal unanimously affirmed the decision of the Local Board and the appellant was notified of such action (T. p. 54). The file of the Local Board likewise discloses that, as an incident of the appeal, a hearing was conducted by the Department of Justice pursuant to Section 5(g) of the Selective Training and Service Act of 1940 (T. p. 65), that such hearing was held before a Hearing Officer in San Francisco, California, on March 23, 1943 (T. p. 66), that the appellant appeared accompanied by his mother and his father, that all of them were heard (T. pp. 67 and 68), and that the Hearing Officer recommended that appellant's claim as a conscientious objector should not be sustained and that he should be retained in Class I-A (T. p. 78). Appellant wrote a letter to the National Director of Selective Service requesting the Director to take a presidential appeal on his behalf (T. p. 64), but the records of the Local Board disclose that no such affirmative action was taken (T. p. 42). On July 3, 1943, the Local Board mailed the appellant an order to report for induction into the land or naval forces of the United States at Redwood City, California, on the 17th day of July, 1943 (T. p. 58). Appellant admitted the receipt of the order to report for induction and his failure to report (T. p. 81). The appellant was likewise mailed a notice of delinquency, to which he failed to respond (T. p. 61). It was because of the failure to comply with the order of induction that he was indicted for a violation of the Selective Training and Service Act of 1940, as amended (50 USCA, Section 311).

THE ISSUE.

All of appellant's assignments of error raise but a single issue, which we believe may be fairly and correctly stated as follows:

May a defendant who has been indicted for his failure to report for induction into the armed forces of the United States defend such failure in a criminal prosecution by collaterally attacking the Board's administrative acts?

POSITION OF THE GOVERNMENT.

The answer to the above-stated question is "No".

ARGUMENT.

The issue above stated is precisely the one considered by the Supreme Court of the United States in the case of

Falbo v. The United States of America, decided January 3, 1944 (No. 73, October Term, 1943), in which the said Court affirmed the conviction of the appellant. In its decision the Supreme Court said:

"The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report for the last step in the selective process. We think it has not."

To the same effect see also:

United States v. Bowles, 131 F. (2d) 818 (CCA-3), affirmed on another ground, U. S. 333;

United States v. Grieme, 128 F. (2d) 811 (CCA-3);

Fletcher v. United States, 129 F. (2d) 262 (CCA-5);

United States v. Kauten, 122 F. (2d) 703 (CCA-2);

United States v. Mroz, 136 F. (2d) 221 (CCA-7);

Gutman v. U. S. (CCA-9), unreported, decided March 7, 1944, No. 10,488.

On authority of the decision of the Supreme Court of the United States in the *Falbo* case, appellee rests his case.

Appellant places great stress on what he considers the failure of the Hearing Officer to accord him a full and fair hearing, although there is nothing in the record of this case to warrant such an accusation. Assuming, however, for the sake of argument that this accusation was true, it is nonetheless the contention of the appellee that the *Falbo* case is authority for the proposition that the failure to afford a registrant a full and fair hearing cannot be properly raised as a defense in a criminal prosecution for a violation of the Selective Service Act. In

Gutman v. United States, *supra*, the appellant attempted to secure a reversal of his Selective Service conviction, assigning as error, among other things, that his Local Board had failed to accord

him a full and fair hearing when he appeared before its members. This Honorable Court gave no sanction to this defense and affirmed the judgment of conviction on authority of the *Falbo* case. Certainly it cannot be argued that the failure of the Hearing Officer to accord a full and fair hearing is a denial of "due process" when the failure of the Local Board to accord such hearing is not considered as such. Thus the appellee's contention that the *Falbo* case is not controlling in the case at bar would appear to be completely without merit.

CONCLUSION.

Accordingly we respectfully submit that the judgment of the District Court was correct and it should be affirmed.

Dated, San Francisco,
April 14, 1944.

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Assistant United States Attorney,

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122
No. 10574

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 10574
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

The Issue.

The issue is *not* as stated by the appellee: "May a defendant who has been indicted for his failure to report for induction into the armed forces of the United States defend such failure in a criminal prosecution by collaterally attacking the Board's administrative acts?" (Brief for Appellee, p. 4.)

No such broad contention is made by the appellant. The narrow claim asserted is that the denial to a registrant of procedural due process by a Selective Service Agency renders its order void; and its invalidity may be asserted in a defense to a criminal prosecution under the Selective Training and Service Act.

More particularly and more narrowly the critical issues in the instant case may be thus stated: May a registrant prosecuted under the Selective Training and Service Act for violation of an order of a Selective Service Agency assert as a defense to said prosecution that the order is void because it violates due process of law and the regulations of the Selective Service System in that a Hearing Officer refused to inform the registrant (who claims to be a conscientious objector) as to the general nature and character of any evidence unfavorable to him; and in addition, the Hearing Officer misleads the registrant by advising him there was no evidence against him, and then the Hearing Officer bases his ruling against the registrant, upon such information.

Additionally, is the denial of a personal hearing by a local Draft Board, a denial of due process and a violation of the regulations of the Selective Service System; and can such denial be asserted as a defense?

ARGUMENT.

Point 1. *Falbo v. United States* Is Not Determinative of the Issue in the Instant Case.

In *Falbo v. United States*, 320 U. S. 549, the Supreme Court, as quoted by the appellee (Brief for Appellee, p. 4) decided merely the following narrow question: "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process. We think it has not."

The availability of judicial review "of the propriety of a board's classification" is not the issue in the case at bar; the issue, as heretofore stated, is rather whether denial of procedural due process and the violation by a Hearing Officer of an express instruction outlining the nature of due process, issued by the Department of Justice itself, makes a Draft Board order void so that one who is prosecuted for violating it may defend against it.

Point 2. *Gutman v. United States* (C. C. A. 9), No. 10488, Is Not Decisive.

The *Gutman* case was decided by this Court without opinion.

The appellant in that case, as correctly pointed out by the appellee in its brief, made no reference to the *Falbo* case at all. The Court might well have concurred in the view of the appellee that the appellant's failure to distin-

guish or even mention the *Falbo* case constituted in effect a concession that the *Falbo* decision by the Supreme Court determined all of the issues in the *Gutman* case. Additionally, the *Gutman* case did not involve a claim of denial of due process by a Hearing Officer; nor were the instructions proffered by the appellant in the case at bar, submitted to the District Court in the *Gutman* case, nor an issue on appeal.

In the instant case the following instruction in part was requested by the appellant and rejected by the District Court below:

“You are further instructed that an opportunity to be heard includes an opportunity furnished to the registrant to know the nature and import of any evidence in the possession of the hearing officer adverse to the registrant, so that the registrant may be afforded the right and opportunity to meet or otherwise refute such adverse evidence.

“You are further instructed that a finding by a hearing officer, or a recommendation by a hearing officer based upon evidence or information not made known to the registrant and without affording the registrant an opportunity to meet or refute such evidence, is not in accord with due process of law, and makes such finding or recommendation arbitrary and capricious; and a hearing resulting in such findings or recommendation is not a fair hearing as required by due process of law.” [Part of Defendant’s Requested Instruction No. 1, R. 106, 107.]

The pertinency of such an instruction, and the error of the trial court in rejecting it is seen from the follow-

ing: "Instructions and directions to registrants claiming exemption as conscientious objectors" issued by the Department of Justice [Defendant's Exhibit "D", R. 85, 86], assure a registrant, who is a conscientious objector, that he is entitled to notice of information in the possession of the Hearing Officer, which is adverse to the registrant. It provides [R. 85, 86]:

"4. At the hearing, the registrant, at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence."

Moreover, the instructions assure that information the source of which is not disclosed to the registrant shall not be used by the Hearing Officer as the basis for a ruling adverse to the registrant. Thus the Department of Justice's "Memorandum to Hearing Officers Appointed Pursuant to Section 5(g) of the Selective Training and Service Act of 1940" [R. 99, 102], reads:

"A clear and succinct statement of the facts which will apprise the registrant of the objections raised to granting his claim is sufficient. *However, no Hearing Officer should make any finding of facts detrimental to the registrant which is based upon information, the source of which is not disclosed to the registrant.*" (Italics ours.)

The appellant was not only the victim of a report by the Hearing Officer recommending the rejection of his

claim as a conscientious objector, based upon information adverse to the registrant, the sources of which were not disclosed to the appellant,¹ but the Hearing Officer misled the appellant by advising him that there wasn't any evidence against him, after the Hearing Officer was expressly asked if there was such adverse evidence. [R. 89, 98.]

The information upon which the Hearing Officer relied was substantially and prejudicially false. [R. 90.] The appellant, however, was never afforded an opportunity to demonstrate to the Hearing Officer the falsity of the charges against him.

Additionally, there was evidence that the registrant's local Draft Board did not accord the defendant a personal hearing as expressly required by the regulations. (The pertinent regulations are set forth in Appendix A, annexed to this brief.) The appellant testified that he was not "given an opportunity to present any evidence" and was not given a personal hearing in connection with his classification [R. 83]; that on the occasion when he appeared before the Board the only matter discussed was that of an appeal to be taken by him from the classification of the Board theretofore given him as I-A. The testimony of the defendant is corroborated by the official records of the local Draft Board which contain no minute order of any personal hearing accorded the appellant. According to the minutes kept by the Board the appellant ap-

¹"Report of Hearing Conducted by the Department of Justice Pursuant to Section 5(g) of the Selective Training and Service Act of 1940," Defendant's Exhibit "C" [R. 65].

peared on October 5, 1942, "*re* appeal, no action." [R. 42.]² On October 8, 1942, the appellant was given a I-A. [R. 41.]

Despite this showing, the trial court in effect directed the jury to disregard this evidence by refusing to give the following instruction requested by the appellant [R. 110]:

"You are instructed that under the Rules and Regulations of the Selective Service system a registrant who objects to a classification given him by a local draft board, has the right to request a personal appearance and hearing before said local board; that the registrant at said hearing is entitled to present evidence or information to the board supporting his claim for a classification, and is entitled to have evidence heard and considered by said local board.

"You are further instructed that if a local board refuses to permit a registrant to produce such evidence, or if a local board refuses to consider said evidence, that said hearing violates due process of law; is arbitrary and capricious and an order resulting from such a hearing is void."

That evidence showing a failure to accord a personal hearing to a registrant may be proffered as a defense to a criminal prosecution is the import of a noteworthy unreported opinion by United States District Court Judge A. F. St. Sure. The text of the opinion is set forth in Appendix B.

²On the last sheet of a registrant's questionnaire there is a space for the Board to make minutes of action taken by it. These records are made by a member or agent of the Board.

The record in the instant case discloses, accordingly, a gross violation on the part of the Hearing Officer not only of rights assured the appellant by the Selective Service System itself, through appropriate instructions to Hearing Officers, but the right to notice of information adverse to him—a right inherent in due process and implicit in the administration of an administrative system consistent with constitutional right and fair dealing.

Due process moreover, was violated by the local Draft Board itself in failing to accord the registrant a personal hearing. This failure constituted a direct violation, in addition, by the local Board of the Selective Service Regulations 625.1 and 625.2. [Appendix A.]

Conclusion.

The *Falbo* case may not be used as a “trap”³ to ensnare the sincere conscientious objector; nor does it, or was it intended to, annul the constitutional guarantees of freedom of religion and to due process of law.

Respectfully submitted,

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³The phrase is from *Billings v. Truesdell*, United States Supreme Court, decided March 27, 1944.



APPENDIX A.

REGULATIONS, SELECTIVE TRAINING AND SERVICE SYSTEM.

Part 625—Appearance Before Local Board

Sec.

625.1 Opportunity to appear in person.

625.2 Appearance before local board.

625.1. Opportunity to appear in person. (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to

the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter should be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

625.2 Appearance before local board. (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral,

shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

APPENDIX B.

In the Southern Division of the United States District Court for the Northern District of California.

United States of America, Plaintiff, vs. John Gilbert Laier, Defendant. No. 28036-S.

OPINION.

St. Sure, District Judge:

The Grand Jury presented an indictment against the defendant charging him with failing to report for induction under the Selective Training and Service Act of 1940, 50 USCA App. 301 *et seq.* The case was tried to the Court without a jury. At the close of the trial defendant moved to dismiss the indictment on the ground that the evidence was insufficient to support the charge.

The facts are undisputed. Defendant is a registrant of Local Board No. 112 at Palo Alto, California. After he was classified by that board in class 1-A he requested an opportunity to appear in person before the board as was his right under the provisions of Rule 625.1 of the Selective Service Regulations. His request was denied. He then appealed to Board of Appeal No. 9 at San Jose, which affirmed the action of the local board in classifying the registrant in class 1-A. Thereafter the local board ordered defendant to appear for induction on May 22, 1943, and the indictment is predicated upon his failure to comply with that order.

Defendant contends that because of the failure of the board to permit him a personal appearance, he was denied due process of law, with the result that the board never acquired jurisdiction to issue an order of induction; that

the order of induction issued was void and the registrant was under no legal duty to comply with it.

The Government argues that the failure of the board to grant a hearing is no defense in the present prosecution but can only be the subject of a habeas corpus proceeding after induction of the registrant; and that regardless of the rule permitting a hearing, the appeal cured any error committed by the local board.

In support of its first contention the Government cites *U. S. v. Griemes* and *U. S. v. Sadlock*, 129 F. (2nd) 811. In those cases defendants, who were Jehovah's Witnesses, attempted to introduce evidence that they should have been classified as ministers of the gospel and that the board acted arbitrarily and capriciously in classifying them as conscientious objectors. The court held that whether or not the board acted arbitrarily and capriciously was a matter to be determined on writ of habeas corpus and that it was not a defense to a criminal prosecution for failure to report for induction. In its opinion the court stated that "whether a registrant is a minister of religion presents a question of fact which, from its very nature, is committed by the act to the determination of the competent local draft board."

There is a practical reason for this rule, because to permit a court or jury in prosecutions for draft evasion to determine whether the defendant was in fact properly classified would have the effect of nullifying the power expressly committed to the draft boards to classify registrants. A similar thought is expressed in *U. S. ex rel. Koopowitz v. Finley*, 245 Fed. 871, which arose under the Selective Draft Act of 1917; Whether a person is a non-declarant alien or not is a question of fact, exactly

the same as whether a person is a duly ordained minister of religion . . . , and the clear purpose of the act was that the fact should be ascertained by the administrative boards which the President was authorized to create. Any other method would have made the act, . . . unworkable.”

The Government also cites *Fletcher v. U. S.*, 129 Fed. (2nd) 262, where the same contention was made by the defendant, and the court held that evidence as to whether the board acted arbitrarily and capriciously was properly refused.

It may well be that where the record shows compliance with the regulations made for the protection of the registrant, and it is a question of fact and law this question should properly be determined on habeas corpus. But I am of the opinion that where, as here, the record itself shows that the draft board has disregarded the regulations and has exceeded its jurisdiction in classifying a registrant, the order to appear for induction is void as a matter of law and the indictment predicated thereon is subject to a motion to dismiss.

The provisions of Rule 625.1 are mandatory: “Every registrant . . . shall have an opportunity to appear in person . . . ” under conditions which, it is admitted, the registrant complied with. Rule 625.2(c) provides in part: “After the registrant has appeared . . . the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified. . . .” Rules 625.2(d) and (3) require that the draft board, after the personal appearance of the registrant, shall mail a new notice of classification to him which is subject to the same

right of appeal as the original classification. Rule 625.3 provides that if the registrant requests a personal appearance he shall not be inducted until 10 days after the new notice of classification referred to in 625.2(d) is mailed to him by the local board.

From the above provisions it clearly appears that the registrant is entitled to a hearing as a matter of right. And it is settled law that such a personal hearing is a part of due process in such proceedings. 16 C. J. S. 622; *St. Joseph Stockyards Co. v. U. S.*, 298 U. S. 38; *Yamatoya v. Fisher*, 189 U. S. 86.

It is also apparent that the application for an opportunity to be heard actually suspends the classification of the registrant who after such hearing must be reclassified "in the same manner as if he had never before been classified," and that he may not be inducted until ten days after he receives the new notice of classification.

Admittedly, the local board failed to comply with these provisions, and the effect of such failure would seem to be that the registrant was not classified at all, nor could he legally be inducted, at the time it made its order. In issuing its order, the board acted entirely outside its jurisdiction and without any legal authority.

The government further contends that the appeal by registrant to the Board of Appeal cured any error that the local board may have committed. It is urged that because the defendant furnished the appeal board with all the information that he might have presented at a hearing before the local board he was not prejudiced.

The fact that the Board of Appeal sustained the classification made by the local board in no way lent legality to its erroneous procedure. Defendant was entitled under

the Regulations and as a part of due process of law to make a personal appearance. As well might it be said that an accused who was incarcerated during a criminal trial but permitted to submit a written statement of his case in court and present his case. Moreover, if the regulations had been followed, defendant would have been entitled to an appeal from the new classification, which in his case was never made.

The Government cites *Bowles v. U. S.*, 319 U. S. 33, as supporting its contention. There the defendant contended that the local board misinterpreted the act in classifying him. A final appeal by the registrant to the President had been granted, and the Director on that appeal made a determination of fact adverse to the claim of petition that he was a conscientious objector. The Supreme Court held that this determination superseded that of the local board, that the order for induction was based upon that determination, and that therefore, whether or not the registrant was given a fair hearing before the local board was not a defense to the criminal prosecution. Where facts are determined *de novo* on appeal, the appellant is not prejudiced by error committed by the inferior fact-finding body. In the present case, however, the objection is not made primarily to the facts as found by the local board but to the fact that defendant was denied his lawful right to appear in person and be heard. This error, it would seem, could be cured only by granting such hearing.

The motion to dismiss the indictment will be granted.

Nov. 8, 1943.

No. 10574.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Notice of Motion to Remand Cause, Motion, Affidavit
and Memorandum of Points and Authorities in
Support Thereof.

FILED

MAY 15 1944

PAUL P. O'BRIEN,
CLERK

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No. 10574.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Notice of Motion to Remand Cause.

*To Frank J. Hennessey, United States Attorney, and
Joseph Karesh, Assistant United States Attorney,
Attorneys for Appellee:*

You and each of you will please take notice that the appellant will move the Court for an order remanding the above entitled cause to the United States District Court for the Southern District of California, Central Division, in the court room of said Court in the Post Office and Federal Building, San Francisco, California, on the 27th day of May, 1944, at 10:00 A. M. or as soon thereafter as counsel may be heard.

The appellant will rely upon the affidavit of Jack W. Bagley, the transcript of record on file in the above entitled cause, and the memorandum of points and authorities submitted herewith.

A. L. WIRIN and

J. B. TIETZ,

WAYNE M. COLLINS,

THEODORE TAMBA,

By A. L. WIRIN,

Attorneys for Appellant.

No. 10574.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Motion to Remand.

The appellant, Jack W. Bagley, moves the Court for an order to remand the above entitled cause to the United States District Court for the Southern District of California, Central Division, with instructions that said District Court proceed with the cause pursuant to the decision of the Supreme Court of the United States in *Billings v. Truesdell*, decided March 27, 1944.

A. L. WIRIN and

J. B. TIETZ,

WAYNE M. COLLINS,

THEODORE TAMBA,

By A. L. WIRIN,

Attorneys for Appellant.

No. 10574.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Affidavit of Jack W. Bagley in Support of Motion to
Remand.

United States of America, State of California, County of
San Francisco—ss.

Jack W. Bagley, being first duly sworn, deposes and
says:

That he is the appellant in the above entitled cause and
appeal.

That the appellant was convicted in the Court below
under an indictment filed August 3, 1943, which charged
the appellant with having knowingly and feloniously failed
to comply with an order of his local Draft Board on or
about the 17th day of July, 1943, to report for induction
into the Land or Naval Forces of the United States. In

said order to report for induction [Tr. of Record 58] the affiant was advised that upon his reporting to his local Board on said 17th day of July, 1943: "You will there be examined and if accepted for training and service you will then be inducted."

On or about said 17th day of July, 1943, the affiant understood, was of the belief, and had been advised that upon reporting to his local Draft Board as directed so to do by the order of induction [Tr. of Record 58], he thereby voluntarily surrendered to and became a part of the Armed Forces of the United States Army; that the affiant, as a conscientious objector, was unable to thus surrender to the United States Army and become a part thereof.

The affiant did not discover until the date of this affidavit that a registrant under the Selective Training and Service Act, ordered to report for induction does not become a member of the Armed Forces until and unless he takes the oath administered to the inductees.

The affiant is willing at this time to comply with the order to report for induction heretofore issued by his local Draft Board, or any new order to report for induction which may be issued by his local Draft Board up to the point of actually becoming a member of the United States Army; and the affiant is willing to take any other steps, up to said point of submission to said United States Army, so far as are now known to the affiant, which he may be ordered to take, short of and other than, such actual submission to said Army.

The affiant is willing to take such steps in order to exhaust all administrative steps and procedures in order to secure a judicial review of the action of the Selective Service Agencies which said action the affiant has claimed, and believes, to be in violation of his rights to due process of law, and in violation, by said Selective Service Agencies, of both the constitutional and the Selective Training and Service Act and Regulations adopted pursuant thereto.

Had the affiant, on or about July 17, 1943, known or been advised that reporting as directed by his local Draft Board, without taking the oath, would have continued civil, as distinguished from military jurisdiction over the affiant; and had the affiant known or been advised that such a report on his part to the place directed in said order was necessary in order to secure a judicial review of the arbitrary action of the Selective Service Agencies, the affiant would have so reported.

JACK W. BAGLEY.

Subscribed and sworn to before me this.....day of May,
1944.

.....
Notary Public in and for Said County and State.

No. 10574.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Memorandum of Points and Authorities in Support of Appellant's Motion to Remand.

Preliminary Statement.

On March 27, 1944, the Supreme Court of the United States in *Billings v. Truesdell*, for the first time outlined and clarified the appropriate and necessary procedural steps within the Selective Service System for a registrant to take in order to exhaust the administrative remedies within that administrative system to permit a judicial review of alleged arbitrariness by the Selective Service Agencies.

The import of the *Billings* decision is that a registrant who complies with an order of induction to the extent of reporting for induction without, however, taking the oath administered to selectees, has so far exhausted his admin-

istrative steps so as to be entitled to a judicial review. Prior to the *Billings* decision the law was in a state of precarious uncertainty; this Court did not speak upon the subject; not until *Falbo v. United States*, 320 U. S. 549, decided January 3, 1944, did the Supreme Court pass upon the question.

The appellant was indicted (prior to the *Billings* and *Falbo* decisions) on August 3, 1943 [Tr. of Record 2]. He was charged with having violated a local Draft Board order issued on or about the 17th day of July, 1943.

As appears from the affidavit of the appellant, filed concurrently with the instant motion and this memorandum, he did not comply with the order because, in effect, he did not anticipate in 1943, the import of the Supreme Court ruling in the *Billings* case in 1944. Had the appellant known, or been advised, or guessed accurately what the Supreme Court would decide in 1944, namely, that it was necessary for him to comply with the order of his local Board for induction to the point of refusal to submit to the oath, he would have done so. This the appellant is willing to do now. Hence the instant motion to remand the cause to the trial court in order that the appellant, as well as the trial court, may be afforded an opportunity to permit the appellant to follow the procedural steps within the Selective Service System outlined by the Supreme Court in the *Billings* case as a condition precedent to judicial review of the unconstitutional, illegal, and arbitrary action by the Selective Service Agencies alleged by the appellant.

Accordingly, the instant motion poses the question to be stated below :

Question Stated.

Is it appropriate for a Court of Appeals to remand a cause to the trial court in order to afford that Court and the appellant an opportunity to comply with a decision of the United States Supreme Court outlining procedural steps a registrant under the Selective Training and Service Act must follow in order to secure judicial review of an allegedly arbitrary and illegal classification, when the appellant failed to take such steps because of the uncertainty of the law upon the subject at the time of the original prosecution against him?¹

Point 1: The Effect of *Billings v. Truesdell*.

In the *Billings* case the Supreme Court, for the first time, undertakes to outline the procedural steps which a registrant under the Selective Training and Service Act must take and complete before he may be entitled to judicial review of an alleged arbitrary classification by the Selective Service Agencies.

One who reports to an induction station pursuant to an order of a local Draft Board so to do, follows the procedure outlined in the *Falbo* case for exhaustion of admin-

¹Put more challengingly, should a layman be punished for having failed to guess accurately the effect of a Supreme Court decision? Or will a Court of Appeals, in the administration of justice, direct his relief from his having guessed erroneously by remanding the cause to the trial court with appropriate instructions?

istrative remedies. In the *Billings* case the Supreme Court thus put it:

“It should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. It follows that one who follows that procedure has exhausted all necessary administrative steps, and may then challenge an order in the courts.”

Otherwise, said the Court in the *Billings* case, the *Falbo* decision would make that case a “trap . . . by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board’s order to report.”

Point 2: In the Exercise of Its Appellate Jurisdiction a Court of Appeals May Consider a Change in the Law Which Has Supervened Since the Judgment in a Trial Court, and Make Such Disposition of the Case as Justice Requires, Including the Remanding of the Cause to the Trial Court With Appropriate Instructions.

In *Patterson v. Alabama*, 294 U. S. 600, 607, the Supreme Court, through Chief Justice Hughes, thus reviewed the law:

“We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires.

“And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act.” (Citing numerous cases.)

More recently the Supreme Court in *New York ex rel. Whitman v. Wilson*, 318 U. S. 688, 690, recognized a change in the law resulting from a state court decision as making it “appropriate to vacate the judgment and to remand the cause to the state court for its determination in the light of that decision, and for such further and other proceedings as may be deemed advisable.”

The Supreme Court applied the same principle in *State Tax Commission of Utah v. Van Cott*, 306 U. S. 511.

In *Villa v. Van Schaick*, 299 U. S. 152, 155, the Supreme Court expressed the same view:

“We have frequently said that in the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. In determining what justice does require we have considered changes, either in fact or in law, supervening since the judgment was entered and in such cases we have set aside the judgment and remanded the cause so that the state court might be free to act.”

To the same effect are :

Missouri ex rel. Wabash Railway Co. v. Public Service Commission, 273 U. S. 126, 131;

Watts, Watts & Company v. Unione Austriaca Di Navigazione, 248 U. S. 9;

Gulf v. Dennis, 224 U. S. 503, 507.

The approach of the Supreme Court to the administration of justice finds its counterpart in the action of this Court in *Gross v. United States*, 136 Fed. (2d) 878. In that case this Court acknowledged its broad authority of judicial supervision over the administration of criminal justice in the Federal District Courts by reversing a cause, on its own motion, upon a point not urged by the appellant in the trial court.

McNabb v. United States, 318 U. S. 332, is in accord.

Conclusion.

The motion to remand should be granted in the interests of a fair and full administration of justice. If the appellant has been deprived of the right to a judicial review of administrative action claimed by him to be in denial of due process, because he failed to divine accurately what the Supreme Court might at some later time determine to be the technically correct administrative steps for him to take, it is not now too late for this Court to accord to the appellant the right to a full and fair "day in court." To paraphrase the language of the Supreme Court in *Monogahela Bridge Co. v. United States*, 216 U. S. 177, 195, the appellate courts of the United States have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law and justice, to relieve a defendant charged with crime for

having guessed wrong as to what to do—particularly when all the lawyers in the country, and most of the judges, also guessed wrong.²

Respectfully submitted,

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WAYNE M. COLLINS,

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By A. L. WIRIN,

Attorneys for Appellant.

²Should this Court determine to remand the cause, the incidental problem will then arise as to what instructions this Court should give to the District Court.

This Court might well direct that the indictment be dismissed. Such a dismissal, would not result in immunizing the appellant from further liability under the Selective Training and Service Act, either from the authority of the Selective Service Agencies to reprocess the appellant, nor of the civil courts to entertain criminal prosecutions in the event of a claimed violation of any order made by any Agency under that Act. But upon such reprocessing by the Selective Service Agencies, in the light of the *Billings* decision, the appellant would then exhaust all of the administrative steps required of him so as to be entitled to judicial review in the event of a further arbitrary classification by the Selective Service Agencies. Then the appellant would be in a position under the *Billings* case, in the event of a prosecution against him for a violation of such an order, to defend against such order by demonstrating its arbitrariness and illegality. Surely the appellant is entitled to such a "day in court." Anything less than that reflects upon the administration of justice in the Federal Courts, as well as the fairness of the administration of the Selective Service System itself.

In the alternative, this Court could remand the cause for retrial. Upon such a retrial the appellant might defend on the ground that his failure to report was not "knowingly and feloniously," as charged in the indictment; that he failed to report as ordered because of a mixed mistake of law and of fact.

That a mistake of fact constitutes a good defense to an indictment charging an offense requiring express intent is well recognized. That a mistake in law, under special circumstances, may equally avail as a defense is recognized when that mistake may disprove the existence of a required specific intent. See *Townsend v. United States* (Dist. of Col. Ct. of App., 1938), 95 F. (2d) 352, including the noteworthy dissent by Justice Stephens. Cf. also, cases cited in the *Townsend* decision including *United States v. Murdock*, 290 U. S. 389, 393, 396.

No. 10580

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Appellant,

vs.

EDWARD J. JASPER, Administrator of the
Estate of Emmet C. Jasper, deceased, AL-
BERT BROWN and CHARLES M. DAKE,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

NOV 29 1943

PAUL P. O'BRIEN,
CLERK

No. 10580

United States
Circuit Court of Appeals

For the Ninth Circuit.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

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Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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Portland, Ore.,

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McCAMANT, KING & WOOD,

American Bank Bldg.,
Portland, Ore.,

for Appellee.

person operating said insured vehicle is covered by said policy of insurance unless such person is operating it with the actual permission of the named insured;

VI.

That on or about June 26, 1942, and at a time when said policy of insurance was in force and effect, Charles M. Dake, one of the above named defendants, was involved in a collision with another car while operating said pick-up truck in Clatsop County, Oregon; that he was on a personal mission of his own at the time and was using said pick-up truck without the permission of Harold E. Wells, the named insured in said policy; that as a result of said collision Emmett C. Jasper, one of the occupants of the other car involved in the collision, came to his death, and Emmett Jasper, Jr., Harold J. Heikkale and Albert Brown allegedly sustained certain personal injuries and the automobile in which they were riding was damaged; [2]

VII.

That as a result of said collision, death, injuries and damage, claims have arisen and one action claiming \$10,000.00 damage has been commenced by Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, against Harold E. Wells, the named insured, and Charles M. Dake, the operator of said pick-up truck, in the Circuit Court of the State of Oregon for Clatsop County;

VIII.

That the defense of said action has been tendered to the plaintiff on behalf of Charles M. Dake by Harold E. Wells, the named insured in said policy by forwarding to plaintiff the summons and complaint therein which had been served upon said defendant Charles M. Dake; that said Charles M. Dake was served with said summons and complaint in Clatsop County, Oregon, while in custody of the Sheriff of said County and with directions from the person making service on behalf of the plaintiff therein to forward said summons and complaint to the plaintiff as the insurance carrier on said pick-up truck, and the plaintiff's attorneys in said action also forwarded a copy of the summons and complaint in that action directly to the plaintiff at its office in the Spalding Building, Portland, Oregon. The plaintiff in said action and the other named claimant defendants herein seek finally to recover from the plaintiff herein under the aforesaid policy for said death and other injuries arising out of said collision and assert in that connection that plaintiff under its said policy of insurance is liable for the negligent acts of said Charles M. Dake in the operation of said pick-up truck. Plaintiff asserts that it has no liability under its said policy of insurance arising out of the operation of said pick-up truck by the said Charles M. Dake at the time and place of said collision and no liability under its said [3] policy for any damages that may be awarded to any of the defendants flowing therefrom, and that because thereof there now exists a

justiciable controversy between the plaintiff and defendants herein.

IX.

That the said Charles M. Dake has admitted his negligence and his liability therefor in connection with said collision;

X.

That it is plaintiff's belief that the said Charles M. Dake is without funds or other assets sufficient to pay any judgment that may be entered against him arising out of the several claims referred to and that the several claimants intend, after the entry of judgment against said Charles M. Dake, to proceed directly against plaintiff on its policy of insurance to try to recover thereon for the said negligent acts and resulting personal liability of the said Charles M. Dake;

XI.

That Edward J. Jasper is the duly appointed administrator of the estate of Emmett C. Jasper, deceased.

Wherefore, plaintiff demands that the Court adjudge:

1. That said defendant Charles M. Dake was on a personal mission of his own at the time said death, injuries and damage occurred and that he was using said pick-up truck at said time and place without actual permission of Harold E. Wells, the named insured in said policy, and without authority from Harold E. Wells to so use it.

2. That the plaintiff herein under the terms of

said policy is not obligated to defend said action on behalf of the said Charles M. Dake and is not obligated to pay any judgment that may be entered against said Charles M. Dake in said State Court action and that the plaintiff likewise and for the same [4] reasons is not liable under its said policy of insurance to the defendants Emmett Jasper, Jr., Harold J. Heikkale and Albert Brown, respecting their alleged claims for personal injury and/or for property damage and that the plaintiff herein has no obligation under its said policy of insurance to defend any action or actions commenced by any of said claimants against said Charles M. Dake.

3. That the plaintiff have its costs herein.

JAMES ARTHUR POWERS

Attorney for Plaintiff

[Endorsed]: Filed Aug. 11, 1942. [5]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT EDWARD J.
JASPER, ADMINISTRATOR OF THE
ESTATE OF EMMETT C. JASPER, DE-
CEASED

Comes now the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and for answer to plaintiff's claim for a declaratory judgment herein, admits, alleges and denies as follows:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Admits the allegations of paragraph IV.

V.

Denies that by and in the terms of said policy the protection and coverage thereof are limited to the said Harold E. Wells and to any other person operating the said insured pick-up truck with the actual permission of the named insured, and denies that no person operating said insured vehicle is or was covered by said policy of insurance unless such person is or was operating it with the actual permission [6] of said named insured.

Admits the remaining allegations of paragraph V.

VI.

Denies that on or about June 28, 1942, at the time of said collision, defendant Charles M. Dake was on a personal mission of his own and was using said pick-up truck without the permission of Harold E. Wells, the named insured in said policy.

Admits the remaining allegations of paragraph VI, except this defendant alleges that the true and correct name of said Emmett Jasper, Jr., is Edward Jasper.

VII.

Admits the allegations of paragraph VII.

VIII.

Admits that this answering defendant, who is the plaintiff in the said action referred to, and such other of the defendants as may have claims as the result of said accident, will seek finally to recover from the plaintiff under the said policy for the said death and other injuries arising out of said collision provided that a judgment or judgments therefor first be secured by this answering defendant or other of the defendants herein against either or both the said Charles M. Dake and Harold E. Wells, the named assured in the said policy, and if an execution or executions thereon shall be returned unsatisfied, either in whole or in part, at that time will assert that plaintiff under its said policy of insurance is liable for the negligent acts of the said Charles M. Dake in the operation of the said pick-up truck.

Admits the remaining allegations of paragraph VIII.

IX.

Admits the allegations of paragraph IX. [7]

X.

This answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of plaintiff's belief that the said Charles M. Dake is without funds or other assets sufficient to pay any judgment that may be

entered against him arising out of any of said claims, and therefore on information and belief denies the same.

Admits that this answering defendant, and possibly also some of the other defendants, if a judgment or judgments are obtained against either or both the said Charles M. Dake and Harold E. Wells and an execution or executions thereon returned unsatisfied, will seek recovery on the said policy of insurance.

XI.

Admits the allegations of paragraph XI.

For a first further and separate answer and defense to plaintiff's claim, this answering defendant alleges that said claim fails to state a claim against this answering defendant upon which relief can be granted, in that there is now pending, but not yet tried or decided, in the Circuit Court of the State of Oregon for the county of Clatsop, an action at law entitled "Edward J. Jasper, administrator of the Estate of Emmett C. Jasper, Deceased, Plaintiff, vs. Harold E. Wells and Charles M. Dake, Defendants," that the Charles M. Dake named as one of the defendants in said action is one of the defendants herein, and that the Harold E. Wells named as one of the defendants in said action is the named insured in said policy of insurance. [8]

A full, true and correct copy of the complaint in said action is hereto attached marked "Exhibit A" and by reference thereto made a part hereof. A full, true and correct copy of the answer of the defendant Charles M. Dake in said action is hereto

attached marked "Exhibit B" and by reference thereto made a part hereof. A full, true and correct copy of the answer of the defendant Harold E. Wells in said action is hereto attached marked "Exhibit C" and by reference thereto made a part hereof.

The issues sought to be raised by plaintiff herein by and in its claim are the same issues involved in said pending action, and the plaintiff herein has available to it an adequate remedy in the said action. This answering defendant is informed and believes, and on information and belief alleges that plaintiff by and through its own attorneys has the direction and control of said pending action.

The determination by the court of the issues and questions sought to be raised by plaintiff in its claim herein would require investigation by the court of disputed facts already in issue in said pending action.

For a second further and separate answer and defense to plaintiff's claim, this answering defendant alleges that said claim fails to state a claim against this answering defendant upon which relief can be granted, in that the said Harold E. Wells, the named insured in the said policy of insurance, is a necessary party to this cause but has not been made a party thereto, and without his presence herein a complete determination of this cause cannot be made. [9]

For a third further and separate answer and defense to plaintiff's claim, this answering defendant alleges that said claim fails to state a

claim against this answering defendant upon which relief can be granted, in that the defendants Harold J. Heikkale and Edward Jasper, herein attempted to be impleaded as "Emmett Jasper, Jr.," are each and both of them in the armed services of the United States of America, no service of process in this cause has been made upon either of them, and the jurisdiction of this court over either and both of them is limited by the provisions of the federal Soldiers' and Sailors' Civil Relief Act of 1940, and each and both of them are necessary parties to this cause, and without the presence of each and both of them herein a complete determination of this cause cannot be made.

An affidavit executed by Charles W. Halderman in support of the allegations of this third further and separate answer and defense is attached to and made a part of the answer of defendant Albert Brown herein, marked "Exhibit A."

Wherefore, having fully answered plaintiff's claim, this answering defendant prays that plaintiff take nothing thereby, but that the same be dismissed and that this answering defendant have and

recover his costs and disbursements herein of and from the plaintiff.

CHARLES W. HALDERMAN
HESSE & FRANCISOVICH

Address: 403 Spexarth Building,
Astoria, Oregon

McCAMANT, KING & WOOD
BORDEN WOOD

Address: 926 American Bank
Building, Portland, Oregon [10]

If a trial of any issues raised or attempted to be raised in the above entitled and numbered cause is had, this answering defendant demands a jury trial.

BORDEN WOOD

Of Attorneys for Defendant
Edward J. Jasper, Administrator of the Estate of
Emmett C. Jasper, Deceased

[11]

EXHIBIT A

In the Circuit Court of the State of Oregon
for Clatsop County

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,
Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

COMPLAINT

Comes now above named plaintiff and for cause
of action against defendants alleges:

I.

That heretofore, on or about the 28th day of June, 1942, one certain Emmett C. Jasper died intestate at the age of 21 years, unmarried, without leaving any surviving widow or children or adopted children, or lineal heirs or dependents, and that thereafter to-wit on the 10th day of July, 1942, plaintiff herein, by consideration of the County Court of the State of Oregon was duly appointed as administrator of his estate, and thereafter duly qualified, and thereafter to-wit on the 10th day of July, 1942, Letters of Administration in said estate were duly issued to him, and have not since been revoked, and that ever since plaintiff herein has been and now is the duly appointed, qualified and acting administrator of said Emmett C. Jasper, deceased.

II.

That during all of the several times hereinafter mentioned the Wolf Creek Highway was and now is one of the duly laid out, dedicated and improved highways of the State of Oregon, running through Clatsop County, Oregon, in a general easterly and [12] westerly direction, but at the locality in question running practically on a level grade in a general northwesterly-southeasterly direction and in a straight course for several hundred feet on either side of the point of collision hereinafter mentioned, improved with a hard surfaced pavement 26 feet in width divided into 2 lanes for traffic in opposite directions, with a clearly marked yellow center line, with rock shoulders several feet wide running along each side, and that the particular locality in question where the hereinafter mentioned collision occurred was neither a business nor residential district as defined by the Oregon Motor Vehicle Act then in full force and effect, but open country still in its original state of Nature.

III.

That heretofore, to-wit, on the 20th day of June, 1942, at about eleven o'clock P. M., deceased was riding as an occupant in a certain Dodge 5 passenger Sedan automobile bearing Oregon license #274-400 for the year of 1942, which was then and there being operated in Clatsop County, Oregon, when the pavement of said highway was dry, over and along said Wolf Creek Highway on the northerly half thereof in a northwesterly direction.

IV.

That during all of the several times hereinbefore and hereinafter mentioned defendant herein, Harold E. Wells, was the owner of a certain International pick-up delivery truck, bearing Oregon license #89-876 for the year of 1942, which at the time heretofore and hereinafter mentioned, and for some time and distance immediately prior thereto, was being operated by said defendants in a general Southeasterly direction over and along said Wolf Creek Highway in an opposite direction to the car in which the deceased was so riding as aforesaid.

[13]

V.

That when said truck so operated by defendants as aforesaid had reached a point on said Wolf Creek Highway about 1000 feet east from the logging road trestle of the Oregon-American Lumber Corporation, and for some time and distance immediately prior thereto, defendants herein carelessly, negligently and recklessly failed to maintain a proper or any lookout for care approaching from the opposite direction, and carelessly, negligently and recklessly drove and operated said truck at an unreasonable and imprudent rate of speed, considering the traffic, surface and width of said highway and other hazards and conditions then and there existing, and carelessly, negligently and recklessly failed to have their truck under proper or any control and without being able to decrease the speed thereof, or to stop the same so as to avoid collision with other vehicles then and there using said high-

way, and particularly with the automobile in which the deceased was so riding as aforesaid, and carelessly, negligently and recklessly failed to drive their said truck upon their right half, or southerly half of said highway, although the same was in good state of repair and in traversible condition, and carelessly, negligently and recklessly drove their said truck with portions thereof protruding over the yellow center line and over the northerly half of said highway, and carelessly, negligently and recklessly failed to drive their said truck as closely as practicable to the right hand edge of said highway, although they were not then overtaking or passing or traveling parallel with another vehicle and were not then and there placing their said truck in a position to make a left hand turn, and carelessly, negligently and recklessly failed to either dim or dip the rays of the headlights of their said truck so as to not [14] project the glaring rays thereof into the eyes of the driver of the automobile in which deceased was riding, and carelessly, negligently and recklessly brought their said truck in violent collision with the automobile in which deceased was so riding in Clatsop County, Oregon, as aforesaid; and that as a direct and proximate result of defendants' said negligence the said Emmett C. Jasper received serious injuries from the effects of which he died a few minutes later.

VI.

That prior to his death the deceased was a strong, healthy young man with a life expectancy of 41.53

years, was energetic, industrious, temperate, economical, or saving habits and capable of rendering services for compensation to others, and had he outlived his life expectancy would have accumulated savings and left an estate in excess of \$10,000.00, and that by reason of defendants so wrongfully and prematurely causing the death of said Emmett C. Jasper, the said estate has been damaged in the sum of Ten Thousand Dollars.

Wherefore, plaintiff prays judgment of this Court against defendants in the sum of Ten Thousand Dollars and for his costs and disbursements incurred herein.

CHARLES W. HALDERMAN
HESSE & FRANCISOVICH
Attorneys for Plaintiff. [15]

EXHIBIT B

In the Circuit Court of the State of Oregon
for the County of Clatsop

EDWARD J. JASPER, administrator of the
estate of Emmett C. Jasper, Deceased,
Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

ANSWER

Comes now Charles M. Dake, one of the defendants herein, and answering unto the complaint of

the plaintiff herein, admits, denies and alleges as follows:

I.

Admits paragraphs I, II, and III thereof.

II.

Answering unto Paragraph IV thereof, admits that Harold E. Wells was the owner of the truck mentioned therein, but denies all other parts and portions of the said paragraph and the allegations therein contained, save and except as is hereinafter affirmatively set forth.

III.

Answering unto paragraph V thereof, defendant denies the same and all of the allegations therein contained, save and except as is hereinafter affirmatively alleged and set forth.

IV.

Answering unto paragraph VI thereof, defendant denies the same.

For a further and separate answer and defense, this defendant alleges:

I.

This defendant alleges that he was negligent as is set [16] forth in plaintiff's complaint but alleges that said negligence was his sole act and that although he was using the truck of the said Harold E. Wells at the time and place alleged in the complaint, that he was not at the said time and place an agent, employee or servant of defendant Harold

E. Wells nor was he driving said truck with the permission of said Harold E. Wells, either directly or impliedly but that he was operating said automobile in defendants absence and without his permission or consent, either express or implied.

Wherefore, having fully answered plaintiff's complaint, this defendant prays that plaintiff take nothing thereby and that he be awarded his costs and disbursements herein.

NORBLAD AND NORBLAD

Attorneys for the defendant,
Charles M. Dake. [17]

EXHIBIT C

In the Circuit Court of the State of Oregon
for the County of Clatsop

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, Deceased,
Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

ANSWER

Now comes Harold E. Wells, one of the above named defendants, answering unto complaint of plaintiff herein, admits, denies, and alleges as follows:

I.

Admits paragraphs I, II and III of plaintiff's complaint.

II.

Answering unto paragraph IV thereof, this defendant denies all parts and portions thereof, save and except this defendant admits that he was the owner of the International truck therein described.

III.

Answering unto paragraph V and VI thereof this defendant denies the same and all parts and portions thereof save and except as is hereinafter affirmatively set forth.

For further separate answer and defense, this defendant affirmatively alleges as follows:

I.

That although this defendant's said truck was being used and driven negligently at the time and place alleged in the complaint by Charles M. Dake, that the said Charles M. Dake was not then and there in the employ of this defendant, nor was he at that time and place an agent, employee or servant of this defendant, nor was he driving this truck with this defendant's permission or consent [18] either express or implied, but that he was operating the said track in the absence of this defendant and without his permission or consent either express or implied.

Wherefore, having fully answered unto plaintiff's complaint this defendant prays that plaintiff take nothing thereby and that he be awarded his costs and disbursements incurred herein.

NORBLAD & NORBLAD

Attorneys for Defendant

Harold E. Wells

[Endorsed]: Filed Sept. 1, 1942. [19]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter coming on for pre-trial conference before the Honorable Claude McColloch, judge of the above entitled court, the plaintiff appearing by James Arthur Powers, its attorney, and the defendants, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, and Albert Brown, appearing by Borden Wood and Robert S. Miller, of their attorneys, as said pre-trial conferences.

I.

The following pre-trial exhibits were introduced by plaintiff and numbered as follows:

1. Letter from Charles M. Dake to Harold E. Wells. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.
2. Policy No. A47,619, issued to Harold E. Wells by plaintiff.
3. Reservation of rights agreement. Objection

reserved on the grounds of incompetency, irrelevancy and immateriality.

9. Judgment roll of proceedings entitled, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, vs Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County. Objection reserved on the grounds of incompetency, irrelevancy, and immateriality. [31]

10. Transcript of testimony in the case mentioned in number 9. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

II.

The following pre-trial exhibits were introduced by defendant and numbered as follows:

4. Affidavit re citizenship of certain defendants.

5. Copy of answer of defendant, Harold E. Wells, in action entitled, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, vs Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

6. Reply of plaintiff to answer of Harold E. Wells in action mentioned in number 5 above. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

7. Answer of defendant, Charles M. Dake, in

action mentioned in number 5 above. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

8. Reply of plaintiff to answer of Charles M. Dake in action mentioned in number 5 above. Objection reserved on the grounds of incompetency, irrelevancy and immateriality.

ADMITTED FACTS

It is admitted that the plaintiff herein conducted the defense of the action in the State Court in Clatsop County on behalf of defendants herein.

III.

It was admitted that plaintiff is a corporation organized and existing under the laws of the State of Connecticut, and as such is engaged in the insurance business. That it is duly authorized and licensed to carry on insurance business in the State of Oregon. That it is a citizen and resident of the State of Connecticut. It was further admitted that the defendants, and each of them, are residents of the State of Oregon, and that a diversity of citizenship exists between the plaintiff and defendants. That such diversity of citizenship did exist at the commencement of this action, and said diversity of citizenship has at all times since said time, and does now, exist. It was further admitted that the amount in controversy, exclusive of interest [32] and costs, exceeds the sum of Three Thousand (\$3,000) Dollars.

IV.

It was admitted that on or about January 5, 1942, plaintiff issued a policy of automobile insurance, Policy A-47619, to Harold E. Wells. That said policy was to be in effect for a period of one year from said date, and covered the operation of a certain 1940 model International pickup truck, owned by Harold E. Wells, bearing Oregon license number 89876.

V.

It was admitted that on or about June 28, 1942, at the time when said policy of insurance was in full force and effect, Charles M. Dake, one of the defendants, was involved in a collision with another car while operating said pickup truck in Clatsop County, Oregon.

It was admitted that as a result of said collision Emmett C. Jasper, one of the occupants of the other car involved in the collision, came to his death, and that Edward Jasper, herein impleaded as Emmett Jasper, Jr., and Harold J. Heikkale and Albert Brown allegedly sustained certain personal injuries when the automobile in which they were riding was damaged.

VI.

It was further admitted that as a result of said collision, death, injuries and damage claims have arisen, and one action claiming Ten Thousand (\$10,000) Dollars damage was commenced by Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, against said Harold E.

Wells, the named insured, and against said Charles M. Dake, the operator of said pickup truck, in the Circuit Court of the State of Oregon for Clatsop County. [33]

VII.

It was further admitted at said pre-trial conferences that the action mentioned in paragraph VI resulted in a verdict of the jury in favor of the plaintiff and against each of the defendants in the sum of Five Thousand (\$5,000) Dollars. It was further admitted that the court set aside the general verdict of the jury as against said Harold E. Wells, and entered a judgment in the said action in favor of the said Harold E. Wells and against the said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased. It was further admitted that an appeal has been perfected from the order of said court setting aside said general verdict of the jury as against the defendant, Harold E. Wells, and from the judgment entered in said action in favor of the defendant, Harold E. Wells, and against the said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased.

VIII.

It was further admitted that the said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and the other named claimant defendants herein will seek to recover from the plaintiff herein under the aforesaid policy for such claims as they may have for said death or other

injuries arising out of said collision, but only if a judgment or judgments therefor first be secured by said Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, or other of the defendants herein, against either or both the said Charles M. Dake and Harold E. Wells, and if an execution or executions thereon shall be returned unsatisfied, either in whole or in part, and in that event, the answering defendants will assert that plaintiff, under its said policy of insurance, is liable for the negligent acts [34] of the said Charles M. Dake in the operation of said pickup truck.

IX.

A jury trial was waived.

X.

The following issues remain for determination at the time of trial:

1. Whether or not this court has jurisdiction; defendant asserts that the said Harold E. Wells, the named insured, is an indispensable party to this cause but has not been made a party hereto. Plaintiff asserts that said Harold E. Wells is not an indispensable party.

2. Whether or not the said judgment entered in the action entitled, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, vs Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for the County of

Clatsop, is res adjudicata as to the defendant, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased. Plaintiff asserts the issues decided therein are determinative of this action as against said defendant, Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and that said defendants are barred from asserting their defenses herein for the reason that the same issue was tried and determined adversely in the Clatsop County action and therefore is an estoppel by judgment against them arising out of the directed verdict in the Clatsop County Action and the judgment entered thereon in favor of defendant Harold E. Wells. Said defendant asserts that the issues decided therein are not determinative of this action.

3. Whether Charles M. Dake is without funds or other assets sufficient to pay any judgment against him arising out of the several claims before mentioned. Plaintiff so alleged; defendant on information and belief denied the same.

4. Whether or not the actual use of said pickup truck at the time of the collision hereinbefore mentioned was with the permission of the named insured, to-wit: said Harold E. Wells.

The foregoing is certified to be a record of the proceedings had at the pre-trial of this cause, and it is

Ordered that the issues to be tried herein shall be those herein set forth as controverted issues.

Dated and entered this 29th day of January, 1943.

CLAUDE McCOLLOCH

United States District Judge.

JAMES ARTHUR POWERS

Attorney for Plaintiff

ROBERT S. MILLER

Of Attorneys for Defendants

[Endorsed]: Filed Jan. 29, 1943. [35]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled and numbered cause coming on for trial before the court sitting without the intervention of a jury on January 29, 1942, plaintiff Hartford Accident and Indemnity Company, a corporation, appearing by James Arthur Powers, its attorney, and the defendants Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and Albert Brown, appearing by Borden Wood and Robert S. Miller, of their attorneys, and the respective parties having introduced testimony, and based upon the stipulation of the parties and an order of this court certain additional evidence was introduced and made a part of the record herein, and

The court having heard the arguments and considered the briefs of respective counsels and deeming itself advised in the premises, makes the following

FINDINGS OF FACT

I.

That plaintiff was and is a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and as such is engaged in the insurance business; [37] and that it is duly authorized and licensed to carry on insurance business in the State of Oregon; that it is a citizen and resident of the State of Connecticut.

II.

That the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, the defendant Albert Brown and the defendant Charles M. Dake, and each of them, are residents and citizens of the State of Oregon.

III.

There is now, and during all times mentioned in the pleadings herein, including the time of the institution of this cause, and at all times since the institution of said cause, there was a diversity of citizenship between plaintiff and the said defendants.

IV.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

V.

On or about January 5, 1942, plaintiff issued a policy of automobile insurance, being its policy numbered A-47169, to Harold E. Wells; that said policy was in effect for a period of one year from said date, and covered the operation of a certain 1940 model International pickup truck, owned by Harold E. Wells, bearing Oregon license number 89876. The limits of liability in said policy are as follows: Bodily injury liability, \$10,000.00 each person; \$20,000 each accident. Property damage liability, \$5,000.00 each accident.

VI.

On or about June 28, 1942, at a time when said policy of insurance was in full force and effect, Charles M. Dake was involved in a collision with another automobile, at which time Charles M. Dake was operating said International pickup truck in Clatsop County, State of Oregon. [38]

VII.

That as a result of said collision mentioned in Paragraph VI hereof, Emmett C. Jasper, one of the occupants of the said other automobile involved in said collision, came to his death, and that Edward J. Jasper impleaded as Emmett C. Jasper, Jr., Harold J. Heikkle and Albert Brown allegedly sustained certain personal injuries when said other automobile in which they were riding was involved in said collision with the said International pickup truck, as hereinbefore mentioned in Paragraph VI hereof.

VIII.

That as a result of said collision, death, injuries and damage claims have arisen.

IX.

That Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, commenced an action in the Circuit Court of the State of Oregon for the County of Clatsop against Harold E. Wells and against Charles M. Dake for the recovery of the sum of \$10,000 damages; that said action resulted in special findings by the jury, a full true and correct copy of which is hereto attached marked "Exhibit A," and by reference made a part hereof; that said action resulted in a verdict by the jury, a full, true and correct copy of which is hereto attached marked "Exhibit B," and by reference made a part hereof; that thereafter a motion for judgment, notwithstanding the verdict of the jury, was filed, a full true and correct copy of said motion is hereto attached marked "Exhibit C," and by reference made a part hereof; that thereafter and on the 30th day of October, 1942, a judgment was entered in said action, a full, true and correct copy is hereto attached marked "Exhibit D," and by reference made a part hereof. [39]

X.

That the judgment entered in the action entitled Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, versus Harold E. Wells and Charles M. Dake, defendants,

which action was tried in the Circuit Court of the State of Oregon for Clatsop County, is not res adjudicata as to the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased; that the issues decided in said state court action are not determinative of this action; that the defendants are not barred from asserting their defenses herein; that the same issue or issues herein were not tried and determined in said state court action; that there is not an estoppel of judgment against the defendants as a result of the said judgment entered in said state court action.

XI.

That the defendant Harold E. Wells is not an indispensable party to this cause.

XII.

That Charles M. Dake is without funds or other assets sufficient to pay judgment against him arising out of the several claims aforementioned.

XIII.

That the actual use of the said International pickup truck by Charles M. Dake at the time of the collision hereinbefore mentioned, which is the automobile described in said policy of insurance issued by plaintiff and which policy is involved in this action, was with the permission of said Harold E. Wells, the named insured in said policy of insurance; that the actual use of said truck by the said Dake at the said time and said place of the

said collision was within the contemplation of said Harold E. Wells. [40]

XIV.

That plaintiff and defendants, and each of them, in open court waived a jury trial.

From the foregoing findings of fact, the court makes the following

CONCLUSIONS OF LAW

I.

The court has jurisdiction over this cause. At the time of the institution of said cause there existed, and at all times since the institution of said cause there existed and at the present time there exists a diversity of citizenship between the plaintiff and the defendants.

II.

The matter in controversy, exclusive of interest and costs, exceeds the sum and value of \$3,000.00.

III.

That the actual use of the said International pickup truck by Charles M. Dake at the time of the collision hereinbefore mentioned, which is the automobile described in said policy of insurance issued by plaintiff and which policy is involved in this action, was with the permission of said Harold E. Wells, the named insured in said policy of insurance; that the actual use of said truck by the said Dake at the said time and said place of the

said collision was within the contemplation of said Harold E. Wells.

IV.

That the judgment entered in the action entitled Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, versus Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County, is not res adjudicata as to the defendant Edward J. Jasper, administrator of the estate of [41] Emmett C. Jasper, deceased; that the issues decided in said state court action are not determinative of this action; that the defendants are not barred from asserting their defenses herein; that the same issue or issues herein were not tried and determined in said state court action; that there is not an estoppel by judgment against the defendants as a result of the said judgment entered in said state court action.

V.

That judgment should be entered herein; that plaintiff take nothing by its action herein; and that defendants Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and Albert Brown, and each of them, have and recover of and from the plaintiff their respective costs and disbursements incurred herein, and that said judgment declare the rights of the parties in accordance with the findings of fact and conclusions of law herein announced.

Dated this 21st day of April, 1943.

(Sgd.) CLAUDE McCOLLOCH

Judge [42]

EXHIBIT A

In the Circuit Court of the State of Oregon
for Clatsop County

EDWARD J. JASPER, etc.,
et al

Plaintiff,

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,

Defendants.

SPECIAL FINDINGS

We, the Jury in the above entitled cause, make answer to the following requested special findings as follows:

1. Was defendant Dake at the time of the collision driving said pick-up delivery truck as the agent, servant or employee of defendant Wells and in pursuance of Wells' business? Yes.

2. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck either with the express or with the implied permission or consent of defendant Wells on defendant Dake's own business? No.

3. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck entirely without the permission or consent of defendant Wells and entirely on defendant Dake's own business? No.

HAROLD W. BELL

Foreman [43]

EXHIBIT B

In the Circuit of the State of Oregon
for Clatsop County

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,

Plaintiff,

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,

Defendants.

VERDICT

We, the jury, duly impaneled and sworn to try the above entitled action, find our verdict for the plaintiff and against the defendants, Harold E. Wells and Charles M. Dake, and each of them, and we assess plaintiff's damages in the sum of \$5,000.00.

HAROLD W. BELL

Foreman [44]

EXHIBIT C

In the Circuit Court of the State of Oregon
for the County of Clatsop

No. 16281

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,
Plaintiff,

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,
Defendants.

MOTION FOR JUDGMENT NOTWITHSTAND-
ING THE VERDICT OF THE JURY

Now comes the defendant, Harold E. Wells, by his attorney, A. W. Norblad, and moves the Court for an order and judgment setting aside the verdict rendered by the jury herein in favor of the plaintiff and against the defendant, Harold E. Wells, and for a judgment in favor of the defendant, Harold E. Wells, and against the plaintiff herein. This motion being followed upon the ground and for the reason that at the conclusion of the taking of the testimony herein and when both parties had rested herein, the defendant, Harold E. Wells, moves the Court that the jury be instructed to return a verdict in favor of the defendant, Harold E. Wells, and against the plaintiff upon the ground and for the reason that the plaintiff had not proven his cause of action against the defend-

ant, Harold E. Wells, and thereupon, the Court announced that in its opinion, said motion for a directed verdict was well taken and ought to be granted, but that the Court nevertheless at the request of the adverse party, upon a motion made for that purpose by Mr. F. C. Hesse, a counsel for plaintiff, would submit the case to the jury with leave to the moving party, Harold E. Wells, to move for judgment in his favor, if the verdict was otherwise would have been directed.

A. W. NORBLAD

Attorney for Defendant,
Harold E. Wells [45]

EXHIBIT D

In the Circuit Court of the State of Oregon
for Clatsop County

No. 16281

EDWARD J. JASPER, administrator of the
Estate of Emmett C. Jasper, deceased,
Plaintiff

vs.

HAROLD E. WELLS and
CHARLES M. DAKE,
Defendants

JUDGMENT

This cause having duly come on for trial on the 28th day of October, 1942, plaintiff appearing in

person and by his attorneys, Borden Wood, Charles W. Halderman, and Frank C. Hesse, and defendants and each of them appearing in person and by their attorneys, Norblad & Norblad, and a jury having been duly sworn and impaneled, and witnesses having been duly sworn and examined on behalf of all the parties, and the cause having been duly argued to the jury, and the jury having been duly instructed by the court as to the law, and the jury having returned into Court on the 29th day of October, 1942, at 9:30 P.M., with its verdict in favor of plaintiff in the amount of Five thousand Dollars (\$5000.00) against both defendants and each of them, and with its special verdict that defendant Dake at the time of the collision was driving said pickup delivery truck as the agent, servant or employee of defendant Wells, and in pursuance of Wells' business, and not with Wells' permission on the personal business of defendant Charles M. Dake and their said verdicts having been duly received by the Court and filed by the Clerk of the above entitled court, and attorneys for plaintiff at this time moving the Court for a judgment upon said verdicts;

Whereupon defendant Harold E. Wells, by and through his [46] attorneys moved the Court in accordance with the previous ruling of the Court to set aside said verdict as against him and to enter a judgment in his favor, which said motion the Court allowed, granting plaintiff an exception,

Now, Therefore, by virtue of the law and the premises it is hereby Ordered, Considered and

Adjudged, that plaintiff do have and recover of and from defendant Charles M. Dake the sum of \$5000.— and his costs and disbursements taxed herein in the sum of \$119.70, and that a writ of execution issue therefore,

And it is hereby further Ordered, Considered and Adjudged that plaintiff recover nothing of and from defendant Harold E. Wells and that he recover his costs and disbursements incurred herein, taxed in the amount of \$82.75 of and from plaintiff herein, and that a writ of execution issue there-fore.

Dated at Astoria, Oregon

October 30th, 1942.

ARLIE G. WALKER

Circuit Judge.

A true copy.

ROBERT S. MILLER

Of Attorneys for Defendants

Edward J. Jasper, Admin-
istrator, and Albert Brown.

Served 4/21/43.

[Endorsed]: Filed April 21, 1943. [47]

In the District Court of the United States
for the District of Oregon

Civil No. 1282

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Plaintiff,

vs.

EDWARD J. JASPER, Administrator of the
Estate of Emmett C. Jasper, Deceased; EM-
METT JASPER, JR.; HAROLD J. HEIK-
KALE; ALBERT BROWN and CHARLES
M. DAKE,

Defendants.

JUDGMENT

The above entitled and numbered cause having come on for trial before the court sitting without the intervention of a jury on January 29, 1943, plaintiff appearing by James Arthur Powers, its attorney, and defendants Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, and Albert Brown appearing by Borden Wood and Robert S. Miller, of their attorneys, and each party having introduced evidence and rested, and the court having considered the briefs of respective counsel and having made and entered herein findings of fact and conclusions of law in

favor of the said defendants and deeming itself advised in the premises, it is hereby

Considered, Ordered and Adjudged:

(1) That plaintiff take nothing by its complaint herein.

(2) That the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, do have and recover of and from the plaintiff his costs and disbursements herein incurred.

(3) That the defendant Albert Brown do have and recover of and from the plaintiff his costs and disbursements [48] herein incurred.

(4) That the defendant Charles M. Dake was on the 28th day of June, 1942, involved in a collision with another automobile while said Charles M. Dake was operating an International pick-up truck, as the result of which collision Emmett C. Jasper lost his life and other persons allegedly sustained injuries. That at said time and place the actual use of the said International pick-up truck was with the permission of Harold E. Wells, who is named insured in that certain policy of insurance issued by the plaintiff herein, which policy of insurance is involved in this action.

Dated this 21st day of April, 1943.

CLAUDE McCOLLOCH

Judge

Served 4/21/43.

[Endorsed]: Filed April 21, 1943. [49]

[Title of District Court and Cause.]

OBJECTIONS OF PLAINTIFF TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW TENDERED TO THE COURT
BY DEFENDANTS.

Plaintiff objects to the proposed Findings of Fact and Conclusions of Law tendered to the Court by the defendants, a copy of which was served upon the plaintiff herein on April 21, 1943.

I.

There is no evidence to support said tendered findings and specifically there is no evidence to support Paragraph X and XIII of said proposed findings and plaintiff excepts to any conclusions of law being made or drawn from the same.

II.

Plaintiff objects to said tendered proposed findings of fact and conclusions of law to be based thereon as they do not comply with the Federal rules of Civil Procedure and particularly Rule 52 thereof which requires facts in issue to be specifically found and the conclusions of law to be stated separately thereon.

It is impossible to tell from the general proposed finding to the effect that the use of the pick-up truck involved was with the permission of the named insured, what principal of law the Court is applying. There should be a finding whether this permission was an implied permission or an express permission and there should be a finding of

fact as to the use of the pick-up truck for which this permission obtained and there should be a finding of whether the Court is of the opinion that the use of the pick-up truck being made [50] at the time of the accident was a slight or substantial deviation from the original use for which the permission obtained or a finding of whether the Court is of the opinion that Dake had permission (express or implied) to use the pick-up truck for the purpose for which it was being used at the time of the accident.

There should be a finding of fact of whether the question of permission and consent to use the pick-up truck involved was in issue in the State Court action, and if not, what was in issue in the State Court action between the parties so that it will be possible to apply the law of whether the defendants there took a position which is inconsistent with their position in the within action and so a conclusion of law can be made thereon of whether they chose inconsistent remedies and are barred from a judgment in the within action.

It is submitted that in the absence of such findings, all of which were in issue in the within action, that conclusions of law thereon by the Court cannot be separately stated and there is no way of telling from the general findings and general conclusions of law as tendered by the defendants, what facts the court is acting upon and what principles of law apply thereto and further it leaves out entirely what construction is to be placed upon the omnibus provision of the contract of in-

surance and especially whether any meaning is to be given to the words "actual use" contained therein and is contrary to the Federal Rules of Civil Procedure.

Respectfully submitted,

JAMES ARTHUR POWERS

Attorney for Plaintiff

Due service of the foregoing objections by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 28th day of April, 1943, hereby is accepted.

ROBERT S. MILLER

Of Attorneys for Defendants.

[Endorsed]: Filed Apr. 26, 1943. [51]

[Title of District Court and Cause.]

MOTION FOR ORDER VACATING
AND SETTING ASIDE JUDGMENT

Comes now the plaintiff and moves the Court for an order vacating and setting aside the judgment entered herein on the 21st day of April, 1943, and for an order vacating and setting aside the findings of fact and conclusions of law entered herein on the same date on the grounds and for the reason that said judgment and findings of fact and conclusions of law were entered ex parte and without any opportunity afforded the plaintiff to object thereto, and in order to afford the plaintiff to have a hearing upon its objections to said find-

ings of fact and conclusions of law passed on and determined by the Court, which said objections were filed a few days subsequent to the entry of said judgment and findings of fact and conclusions of law referred to and further to afford the plaintiff an opportunity to present another legal matter which arises out of this same transaction and have the same passed upon by the Court so that final disposition may be had of all issues which have arisen herein. The further legal matter is the result of the Court's proposed holding that Dake is entitled to protection under plaintiff's insurance policy. The plaintiff would like to introduce evidence showing that Dake's testimony on the trial of this case is contrary to written statements made prior thereto by Dake to the plaintiff and also to statements made by the owner of said pickup truck Harold E. Wells [52] and statement made by Witness Sheldon, all of which plaintiff relied upon and which are contrary to the testimony of Dake upon the trial of the cause herein and that Dake even though it be considered that he is covered by the policy in question, has violated the terms and provisions of said policy and particularly has violated the cooperation clause of said policy and by his contradictory statements in writing and by his deposition and by his testimony upon the trial of this case, has mislead the plaintiff and prejudiced the plaintiff's rights and by his acts and conduct he has deprived himself of any benefits and protection under

the said policy that he might otherwise have been entitled to.

JAMES ARTHUR POWERS

Attorney for Plaintiff,
610 American Bank Bldg.,
Portland, Oregon.

Due service of the foregoing motion by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 24th day of May, 1943, hereby is accepted.

ROBERT S. MILLER,
Of Attorneys for Defendants.

[Endorsed]: Filed May 26, 1943. [53]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES ARTHUR POWERS

State of Oregon,
County of Multnomah—ss.

I, James Arthur Powers, being first duly sworn, depose and say that I am attorney for the plaintiff in the above entitled cause, that the first notice plaintiff received of the accident out of which the controversy herein arose was a report by Harold Wells, the assured. This report was made on regular notice of accident form and reported the matter to the plaintiff in the following language:

“Charles Dake took the truck without Wells’ consent leaving Gales Creek Sunday, June 28th on a personal trip to the coast. On his return

trip he met a car head-on causing considerable damage and one fatality. Information at present is to the effect the other car hit the Wells truck on its own side of the road."

This report was made under date of June 29, 1942. There were further statements and in more detail made by the following named persons:

Charles M. Dake;

Corvin Sheldon;

Harold Wells;

the originals being attached hereto and made a part hereof. These written statements have been in the possession of Mr. A. W. Norblad, attorney of Astoria, Oregon, who defended the action brought in the State Court at Astoria, Oregon, against Charles M. Dake and Harold E. Wells and who was employed by the plaintiff herein in that connection.

Plaintiff desires at this time to file the same herein in connection with and in support of plaintiff's motion to have the Court [54] consider at this time the further legal point of whether there has been a violation of the cooperation clause of the policy in suit to the prejudice of plaintiff.

JAMES ARTHUR POWERS

Subscribed and sworn to before me this 21st day of June, 1943.

M. I. GUSTAFSON

Notary Public for Oregon.

My commission expires: 3/11/45. [55]

I, Charles M. Dake, do say that the following is a true statement of my taking and driving the truck of Harold Wells on the week-end of the accident wherein the truck collided with the car in which Emmett Jasper and Edward Jasper were riding, on the Wolf Creek Highway:

I did not at that time have any permission whatsoever to take the truck, either directly or impliedly; that I had driven Harold Wells to his home at Oregon City on Friday night and then was told to take the truck back to Gales Creek, Oregon; that I did so; on Sunday Morning Sheldon and myself were going up into the woods and Sheldon had received permission from Wells to drive the truck up there to fix some of the equipment and I was going along to go hunting; Sunday morning Sheldon did not show up so I took the truck and went up into the woods to go hunting; Sheldon was the one who had permission to take the truck and I was just planning on riding with him to go hunting; however, I took it without permission and went up there into the woods and then when I finished hunting I came out of the woods and decided to go to Tillamook; it was a Sunday and I decided to take a "vacation trip" to Tillamook for the day; I went back to Gales Creek where I lived and left the gun and hunting equipment and then started out to Tillamook; on the road there I ran onto two women and a man who were hitch-hiking along the road and picked them up; they were strangers to me; We went to Tillamook and I have there a cousin by the name of Mike Lewis who I knew had been

looking for work so I went to his house to find him and tell him he could get work at the same logging camp where I was located; I had no permission or instructions from Wells, either implied or directly to go get Lewis or anyone else to go to work for Wells; it was my own idea and I was trying to help my cousin get work; I found out there that he had gone to Portland to work in the ship-yards; so these other three people and myself went up to the beach at Twin Rocks and [56] spent some time on the beach; we drank considerable beer along the way and eventually got up to Necanicum Junction where we entered the Wolf Creek Highway; the accident happened as we were driving along the Wolf Creek Highway going home to Gales Creek; I have never used the truck before except upon direct orders from Wells to run errands for him and this only a few times; that when I drove him to Oregon City, I was directed to take the truck back to Gales Creek and leave it there; My trip to the Coast was my own idea and without any permission or authority whatsoever.

CHARLES M. DAKE

Signed at Salem, Oregon this 19th day of July, 1942.

Witnesses:

WILLIAM W. BARTIE

WALTER NORBLAD [57]

Married & 1 child

27 years

I am Corvin Sheldon, I live at Forrest Grove, Oregon, 16 No. A St. I am employed by

Harold Wells as a Donkey Engineer and a loader. The logging operations are on round top mountain about 8 miles from Glenwood, Oregon. There is no camp at the operations nor does Mr. Wells maintain a Camp. Some of the men live at Gales Creek and some at Glenwood. These men are picked up each morning 5 days a week at the two places, Gales Creek and Glenwood and taken to the logging operations in an International pick up truck, Oregon license #89-876. They are picked up at 7 A. M. except Saturdays and Sundays when we do not log but sometimes we do repair work. I drive my car from Forrest Grove to Gales Creek where the International pick up is parked. The keys are left over week ends most of the time with the people at the telephone office when the truck is not to be used. Mr. Wells most of the time drives the truck picks up the men at Gales Creek and Glenwood and takes them to the operations. When he is not there one of the rest of us drive the truck and pick up the men and take them to the operations then the pick up stays in the woods all day. We haul about ten men in all. On Friday June 26, 1942, I told Mr. Wells I would do some work on the Donkey up in the woods he having ask me to make some repairs. I told him I would make them on Sunday June 28, 1942. Mr. Wells told me to take the pick up truck. It was when we were thru work on Friday June 26, 1942, that we had this conversation. Mr. Wells was driving the truck and Charles Dake and I were in the front seat on our way to Gales Creek. Mr. Wells said if you

want to use the pick up Charles Dake can go to Oregon City with me then drive the truck back so I could have it to use Sunday June 28, 1942. While we were on our way home Friday, Mr. Dake told me if I was going up in the woods to pick him up at Gales Creek where he was boarding and he would go with me. I do not recall what he said he wanted to do up in the woods but he was not going to work. I went to my home as usual and on Sunday June 28, 1942, In the forenoon the exact time I do not remember, I drove my car to Gales Creek to get the pick up at the usual parking place but it was not there. I had some other people with me and when I saw that the truck was not there we drove up the highway some distance and then went back to Forrest Grove. I made no inquiry from anyone as to where the truck was. I did not *kno* who had taken the truck and did not know what had happened to it until Monday noon I having rode up to the job on a logging truck Monday morning June 29, 1942. When one of the men on a logging truck told me Dake had an accident with the pick up. At no time did I ever hear Mr. Dake mention a man by the name of Mike Lewis or that he was going out looking for a man to come to work. Mr. Wells never had asked me to get any men and I have been with him the longest of all now employed. I have not talked to Dake about the details of the accident or how he came to take the truck. But I do know that he was to drive the truck from Oregon City to Gales Creek and leave it so that I could use it Sunday. I have never

known Mr. Wells to give permission to anyone to use the truck *accept* for running errands or driving to and from the logging operations. The truck is most always at Gales Creek or at the operations in the woods. Mr. Wells very seldom takes the truck home on week ends he will ride with some one else. He boards *and* Glenwood during the week.

I have read the foregoing statement on the 4 signed pages and it is true to the best of my knowledge and belief.

CORVIN SHELDON

7-18-42

HARRY G. HADFIELD

Witness: [58]

Portland, Ore

6-29-42

Statement of Harold Wells, Rt #2, Ore. City, Ore. Age 38. Employed by Self as logger.

I own and operate a 1940 Internationsl pickup in my operations which are based at Glenwood. I have had Charles Dake, employed for about 11 mos. His job is that of loader for me. On various occasions I have sent him on errands in which he used the above piece of equipment. I generally keep this rig at Gales Creek and I drive this piece of equipment myself most of the time. On Friday evening June 26, 1942, I drove this piece of equipment from Gales Creek to Oregon City, where I reside. I brought Charles down with me for the sole purpose of taking the pick-up back to Gales Creek. We arrived in Ore. City about 7:30 P. M. and Charles was instructed to take the pickup directly back to

Gales Creek where it was to be left until Monday morning, June 29, 1942. He did not say anything whatever to me about using the pickup for any reason whatever and when he went back to Gales Creek I assumed that he would follow my instructions. He has never requested the use of any of my equipment for personal reasons and I have never at any time permitted him to use this pickup for any reasons. If he had asked me for the use of the pickup for any reason I would have flatly refused to let him have it. The only reasons I use this pickup is for my own personal business reasons. It is used mostly for the purpose of picking up my crew each morning. The woods operations are approximately 15 miles from our various homes and we make the two way trip each day.

On Monday morning, June 26, 1942, at about 7:00-7:30 A. M. The truck did not show up and just afterward some of the boys showed up and said that Charles had driven the truck off about 11: A.M. on June 28, 1942. He hadn't mentioned to anyone that he was going to leave & so far as I know no one knew anything about where he had gone. The truck is always driven down for the crew by F. E. Tusing, my yarder engineer Foster Hotel, Portland, Ore.

I had to get my crew to the woods and sent word to my friend Ralph Haskins to see what he could find out. From what I learned from the boys I was fairly certain that Charles had the equipment especially since he did not show up for work. I fully intended to get my boys working and then re-

turn to report the truck stolen as I figured Charles had skipped out with it.

At about 12:15 P. M., June 29, Ralph came to the woods and reported that Charles was in the Forest Grove Hospital, having been involved in an accident somewhere on the Wilson River Road. I came immediately down to check and found that there had been a serious accident. The only information I have gotten came from Ralph who had talked to Charles in the hospital. As yet we do not even know the exact location of the accident or where the truck is. I have not given any one of my employees at any time any indication whatever that I would permit this equipment to be used for anything other than my own business purposes and directly under my instructions.

I have read the above statement of 2½ pages and it is true and correct.

HAROLD WELLS [59]

Portland, Ore.

7-17-42

Supplemental statement of Harold Wells re: Accident on June 28, 1942, near Clatsop County line involving 1940 International Truck driven by Charles Dake and owned by Harold Wells.

On June 26, 1942, Corbin Sheldon, my loading engineer, was discussing some repairs necessary to the donkey at camp. I had intended to bring my pickup home to Oregon City and keep it but when Sheldon saw fit to do some work on Sunday morning on the donkey I decided to have someone come

to Ore. City and bring the pickup back to Gales Creek so that Sheldon could come there in his own car Sunday and then go into the woods with the pickup to do the necessary work. Dake then said that he would like to go up to the woods with Sheldon and get in a little hunting. Dake had no business whatever with the truck at any time during the week end and no mention at all was made of his using the pickup at any time.

When we go to and come from the woods each day I get off at Glenwood and catch a ride into Oregon City with some of the haulers and the pickup gets me at Glenwood in the morning. I can always catch rides with the boys going up to Glenwood.

Dake has on one occasion called the hiring hall for a choker setter, this was done under my specific instructions and was done because he allegedly knew the fellow at the hiring hall and might have better luck getting someone. The extreme shortage of help makes it almost impossible to get help from the hall. Dake has never had and did not have any authority to hire anyone. All of the boys are supposed to keep their eyes open for help as *their* is an extreme shortage, not only in my camp, but every camp. Dake did not at any time mention this Mike Lewis who he claimed he went to see about work. So far as I am concerned there is no basis to this story.

Sheldon went to Gales Creek on Sunday morning to follow our plans and found the truck gone, he could not get into the woods in his car and he

then went on about his own business. He did *no* know where the pickup might be. It was when I showed up at Glenwood on Monday morning that I found Dake and the pickup gone. One of the drivers who had come down from Gales Creek told us that the truck and Dake had been gone since 11 A. M. on the day before. Dake was never permitted to take the truck from around Camp and he only used it on errands for me. The only time I have let him drive the car on the highway was when he came down with me to Oregon City for the purpose of taking the pickup back to camp for Sheldon to use. Once or twice he has been driving when he and F. E. Tusing who stay at Gales Creek picked the rest of us up at Glenwood.

The above statement of 2 pages is true and correct.

HAROLD WELLS [60]

Forest Grove, Ore.

6-30-42

Statement of Charles Dake, Gales Creek, Ore. Age 37, Employed as logger by Harold Wells. I am working as a loader at present. I have been with Harold for almost one year. On Friday night June 26, 1942, I came to Oregon City with Harold for the purpose of bringing the 1940 International pickup back to Gales Creek as I had to go back to the woods during the morning of June 27 for a while. On Saturday afternoon, June 27, I came to Hillsboro to get my teeth pulled by Dr. Brown. I then returned to Gales Creek.

At about 11:00 A.M. June 28, 1942, I left for Tillamook to see my cousin Mike Lewis who is a rigger. I wanted to see if he would come up to our camp as we were shorthanded at the time. I could not find him and at about 10:00 P.M. I reached the Wilson River Rd. at its junction with the coast hiway. I had been on the coast most of the day having made several stops. I had picked up a man and woman on the coast hiway going toward Tillamook. After reaching Tillamook they decided not to stay and asked if they could come back to Forest Grove. I consented and we were on the way back, having gotten to a point 35 to 40 miles West of Forest Grove. I was travelling east at a speed of about 35 m. p. h. and were rounding a sweeping curve to my right and travelling on my side of the road. I saw a car coming in the opposite direction and apparently going at a fast rate of speed. This car was pulling over toward my side of the road and his lights were blinding me. I pulled over as far as I could during the time I had to do so, and when I saw this car was coming toward me, I applied my brakes but before I could get stopped or even have time to slow up, I was hit headon by the other car. My left front took most of the blow. It happened so fast that I could not tell whether the other driver slowed up or tried to avoid the accident. At the impact I was knocked unconscious and was hurt, I could not do anything much but about 3/4 of an hour later I left the scene. Someone got the names of the people in the other car but I cannot find the list. I was un-

able to get any further information. There were no witnesses to the accident, but some cars came up later. I was brought into town by a sailor. I did not get his name. I have not been contacted by anyone connected with the other car and do not know anything about their injuries or who they were. The girl in my car was bruised some but the fellow was not hurt. The sister of this mans wife was in the front with me and the other two were in the back. There were three all told. They all said they were not hurt except for bruises. I had my lights on high but dimmed them when I saw the other car. His lights were on bright. I am positive that I was completely over on my side of the road and pulled over even further. At the impact my truck was knocked completely over against the south bank. The other car apparently rolled over several times. I had not had a drink at all and so far as I know none of the people in my car had anything to drink. It was clear and dry except for a very slight haze. I had not said anything to Harold about taking the truck to the coast, and have never asked for nor received permission to use the truck for personal reasons. The only reason I went to the coast was to try to get Mike to come to our camp. I have called in on several occasions to get men and Harold has always accepted the men. We were short a rigger and Harold had talked over this with me. He said to find a man if possible over the weekend, and he also expected to look around for someone. I intended to

call Mike but could not get him, so I went to where I had heard he would be.

The road at the point of the accident is blacktop and about 21 ft. wide. I am fairly sure that my right wheels ran off the pavement before the impact.

I have read the above statement of 31 $\frac{1}{4}$ pages and it is true and correct.

CHARLES DAKE

[Endorsed]: Filed June 21, 1943. [61]

[Title of District Court and Cause.]

ORDER OVERRULING PLAINTIFF'S OBJECTION TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on to be heard on the objections of the plaintiff to the proposed findings of fact and conclusions of law tendered to the court by the answering defendants, and the court having heard arguments of counsel thereon, it is,

Ordered that the objections of plaintiff to the proposed findings of fact and conclusions of law heretofore entered on April 21, 1943, be and the same hereby are overruled.

Dated this 3rd day of July, 1943.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 3, 1943. [62]

[Title of District Court and Cause.]

ORDER DENYING MOTION OF PLAINTIFF
VACATING AND SETTING ASIDE JUDG-
MENT

This matter coming on to be heard on the motion of plaintiff for an order vacating and setting aside the judgment entered herein on the 21st day of April, 1943, and for an order vacating and setting aside the findings of fact and conclusions of law entered herein on the 21st day of April, 1943, and

The court having heard the arguments of counsel thereon, it is hereby,

Ordered that said motion is hereby denied.

Dated this 3rd day of July, 1943.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 3, 1943. [63]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Edward J. Jasper, Administrator of the Estate of Emmet C. Jasper, deceased, and Albert Brown, and to Charles W. Halderman, Hesse & Franciscovich of Astoria, Oregon, and McCamant, King & Wood and Robert S. Miller, of Portland, Oregon, their attorneys, and to Charles M. Dake;
Notice is hereby given that the Hartford Ac-

cident and Indemnity Company, a corporation, above named plaintiff, hereby appeals to the United States Circuit of Appeals for the Ninth Circuit from the judgment and the whole thereof, entered in this action for declaratory judgment on the 21st day of April, 1943, and which judgment is now final.

JAMES ARTHUR POWERS,
Attorney for Appellant,
610 American Bank Bldg.,
Portland, Oregon.

[Endorsed]: Filed July 19, 1943. [64]

[Title of District Court and Cause.]

CONDENSED NARRATIVE STATEMENT OF
EXHIBITS

The following Exhibits referred to were received in evidence upon the trial of this action:

Plaintiff's Exhibit 1 consists of a letter reading as follows:

“Harold Wells

Astoria, Ore

Fri

These papers were served on me this mor.
I was told to send them on to you and for you
to send them on to the insurance co.

I have been put on storage for 1 year so wont
be back on the job.

Well so long & good luck.

CHAS. DAKE”

Plaintiff's Exhibit 2 consists of National Standard Automobile Liability Policy issued by plaintiff to Harold E. Wells, insuring the said named insured against liability within limited amounts arising out of the operation of a certain 1940 International truck. The policy among other things contains these provisions:

"Item 5. The purposes for which the automobile is to be used are commercial (light), general hauling (a) The term 'pleasure and business' is defined as personal, pleasure, family and business use. (b) The term 'commercial' is defined as use principally in the business occupation of the named Insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes.

* * *

III. Definition of 'Insured'.

The unqualified word 'Insured' wherever used in coverages A and B and in other parts of this policy; when applicable to such coverages, includes the named Insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named Insured." [67]

The policy designates the insured's occupation or business as "logging" and has an effective date

beginning January 5, 1942, to January 5, 1943, and provides for a total premium of \$29.85.

Plaintiff's Exhibit 3 consists of a reservation of rights agreement whereby the Hartford Accident and Indemnity Company undertook to defend an action on behalf of Charles M. Dake, brought in the State Court by Edward J. Jasper, Administrator of the Estate of Emmett C. Jasper, deceased, against Harold E. Wells and Charles M. Dake.

Plaintiff's Exhibit 4 consists of an affidavit relating to citizenship of parties.

Plaintiff's Exhibits 5, 6, 7 and 8 are pleadings in State Court action. All these same pleadings appear in Exhibit 9.

Plaintiff's Exhibit 9 is a judgment roll in State Court action consisting of pleadings, motion for judgment notwithstanding verdict, and judgment entered therein. By the pleadings, the plaintiff therein, one of the respondents hereto, sought to recover from Harold E. Wells and Charles M. Dake for death of deceased Emmett C. Jasper, resulting from an automobile collision. It is alleged by the complaint and admitted in the answer that Harold E. Wells was the owner of a certain pickup truck being operated by Charles M. Dake. The complaint alleges that said pickup truck was being operated negligently by both said defendants at the time of the accident. The amended answer of Harold E. Wells denied that he was operating the pickup truck at the time of the accident and affirmatively alleged that defendant Charles M. Dake, who was

admittedly driving said pickup truck, was not an agent, employee or servant of defendant Wells at the time of the accident and was not "driving this truck with" defendant Wells' "consent either express or implied but that he was operating said truck in the absence of this defendant without his consent either express or implied" to which the plaintiff filed a reply denying [68] this allegation. The Judgment Roll contains a motion made at the conclusion of the trial reading in part as follows:

"* * * the defendant, Harold E. Wells, moves the Court that the jury be instructed to return a verdict in favor of the defendant, Harold E. Wells, and against the plaintiff upon the ground and for the reason that the plaintiff had not proven his cause of action against the defendant, Harold E. Wells, and thereupon, the Court announced that in its opinion, said motion for a directed verdict was well taken and ought to be granted, but that the Court nevertheless at the request of the adverse party, upon a motion made for that purpose by Mr. F. C. Hesse, a counsel for plaintiff, would submit the case to the jury with leave to the moving party, Harold E. Wells, to move for judgment in his favor, if the verdict was otherwise would have been directed."

The judgment shows that the jury returned a verdict in favor of plaintiff in the sum of \$5000.00 against both defendants reading in part as follows:

“* * * verdict in favor of plaintiff in the amount of Five Thousand Dollars (\$5000.00) against both defendants and each of them, and with its special verdict that defendant Dake at the time of the collision was driving said pickup delivery truck as the agent, servant or employee of defendant Wells, and in pursuance of Wells’ business, and not with Wells’ permission on the personal business of defendant Charles M. Dake and their said verdicts having been duly received by the Court and filed by the clerk of the above entitled court, and attorneys for plaintiff at this time moving the Court for a judgment upon said verdicts;

“Whereupon defendant Harold E. Wells, by and through his attorneys moved the Court in accordance with the previous ruling of the Court to set aside said verdict as against him and to enter a judgment in his favor, which said motion the Court allowed, granting plaintiff an exception,

“Now, Therefore, by virtue of the law and the premises it is hereby Ordered, Considered and Adjudged, that plaintiff do have and recover of and from defendant Charles M. Dake the sum of \$5000.—and his costs and disbursements taxed herein in the sum of \$119.70, and that a writ of execution issue therefor,

“And it is hereby further Ordered, Considered and Adjudged that plaintiff recover nothing of and from defendant Harold E. Wells

♦

and that he recover his costs and disbursements incurred herein,”

Plaintiff's Exhibit 10 consists of transcript of motion for directed verdicts in State Court action which is duplicated in Exhibit 12.

Plaintiff's Exhibit 11 consists of a photograph of wrecked [69] truck.

Plaintiff's Exhibit 12 consists of entire transcript of evidence and all proceedings in State Court action.

Submitted on behalf of Appellant.

JAMES ARTHUR POWERS,
Attorney for Appellant.

Service of the foregoing by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 11th day of September, 1943, hereby is accepted.

McCAMANT, KING & WOOD,
Attorneys for Defendants.

[Endorsed]: Filed Sept. 24, 1943. [70]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages num-

bered from 1 to 74 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 1282, in which Hartford Accident and Indemnity Company is plaintiff and appellant, and Edward J. Jasper, et al. is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designations as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is \$11.30 and that the same has been paid by said appellant.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause, also the original exhibits in this cause, numbered 1 to 12, inclusive, pursuant to an order of this Court dated September 24, 1943.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 12th day of October, 1943.

[Seal] LOWELL MUNDORFF,

Clerk.

By F. L. BUCK,

Chief Deputy. [74]

[Title of District Court and Cause.]

Portland, Oregon
Friday, January 29, 1943
9:00 O'clock A. M.

TESTIMONY

HAROLD EDWARD WELLS

was produced as a witness in behalf of the plaintiff and, being first duly sworn, testified as follows:

The Clerk: Will you state your first name, please. [7*]

The Witness: Harold Edward Wells.

Direct Examination

By Mr. Powers:

Q. State your name for the Court, please.

A. Harold Edward Wells.

Q. What is your line of work?

A. Logger.

Q. Are you married? A. Yes.

Q. Family man? A. Yes.

Q. How many children have you?

A. Two.

Q. How old are they?

A. Nine and eleven.

Q. And where do you live?

A. At Oregon City.

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Harold Edward Wells.)

Q. Mr. Wells, the Hartford Accident and Indemnity Company issued you a policy of insurance on January 5, 1942, on a certain automobile truck. Is that correct? A. Yes.

Q. Is that an International pickup truck, 1940 model? A. Yes.

Q. And for the year 1942 I believe the license number was Oregon 89-876? [S] A. Yes.

Q. You recall that on June 28th, 1942, your truck was involved in an accident? A. Yes.

Q. When did you learn of the accident? I believe that it was Sunday.

A. I learned of it about 10:30 Monday morning.

Q. And who did you learn had been driving your truck? A. Charles M. Dake.

Q. I will ask you to state to the Court whether Charles M. Dake had permission from you to drive that truck? A. No, he did not.

The Court: Is Dake in the courtroom?

Mr. Powers: Yes.

The Court: Will you point him out to me?

The Witness: Back—— (indicating.)

Mr. Miller: Back of the room.

Mr. Powers: Q. The actual use that Dake was making of the truck at that time then was without your permission?

A. Absolutely.

Mr. Powers: You may take the witness.

Cross Examination

By Mr. Miller:

Q. Where is the truck today?

(Testimony of Harold Edward Wells.)

A. My house. [9]

Q. You say you are a logger, logging operator?

A. Yes, sir.

Q. How long have you been in that business?

A. About seven, eight years.

Q. And in June of 1942 you were operating where? A. On Round Top Mountain.

Q. On Round Top Mountain?

A. Up on the Wilson River.

Q. On the Wilson River. How far is that from Tillamook? A. Pardon?

Q. How far is that from Tillamook?

A. Well, to be exact, I don't know.

Q. Approximately?

A. I think it is roughly about thirty miles.

Q. About thirty miles. How far is it from Round Top to where you were operating on Gales Creek?

A. We aren't operating on Gales Creek.

Q. No; I don't say that. From Round Top where you were operating to Gales Creek.

A. Oh. Oh, in the neighborhood of about fifteen miles, I should say.

Q. Now, have you operated at several different places on Round Top?

A. Just two; two sides of it.

Q. Just two sides? A. Uh huh. [10]

Q. Now when you were operating on the first side, we will say, when was that? When was that operation?

(Testimony of Harold Edward Wells.)

A. Well, we started in there in February of 1940, I think it was.

Q. How long did you operate there?

A. Well, we operated there until they closed Wilson River road to build on it and they shoved us off of that.

Q. Did you use the International pickup truck on that operation? A. Yes, sir.

Q. The same one that is involved in this accident? A. Yes, sir.

Q. Then where was the second operation? That likewise was on Round Top?

A. Yes. That was over on the other side.

Q. Now where did you live? At the time of the first operation where did you live?

A. I was living in an auto cabin at the logging camp there and just at the—below Gales Creek a ways.

Q. That is the time of the first operation?

A. Yes.

Q. And that was for several months.

A. Well, it was about three, four months.

Q. Who lived with you?

Mr. Powers: I am going to interpose an objection, your Honor, because I don't think that it has any relevancy or any [11] bearing on what occurred here, two years before this accident occurred.

The Court: Admitted.

Mr. Miller: Q. Charles M. Dake lived with you?

(Testimony of Harold Edward Wells.)

A. Absolutely not.

Q. At the time of the operation then on the first side you lived in the cabin and Dake didn't?

A. Yes, sir.

Q. Did you live with Dake at any time during the period next of 1941, bunkhouse or any other place?

A. Slept in the same bunkhouse with him is all.

Q. That is the time of the first operation?

A. No.

Q. When was that?

A. That is after I had been shut off the Wilson River and went over on the other side.

Q. What time of year was that?

A. Well, that was maybe along in about June, July, August; about through them months.

Q. Of 1940? A. Yes.

Q. Of 1940? A. Uh huh.

Q. Anyone else stay in that same bunkhouse?

A. Anyone else?

Q. Yes. [12]

A. Yes; there was four of us in there.

Q. Four of you in the same bunkhouse. Where was the truck kept at that time?

A. Kept there at the bunkhouse at the camp.

Q. Did you drive the truck at that time?

A. Yes.

Q. Did Dake drive the truck? A. Some.

Q. Did you go hunting with Dake at that time?

Mr. Powers: I am going to object to it again.

(Testimony of Harold Edward Wells.)

your Honor. I can state my objection specifically, and that is this: That the policy provision here is that the actual use of the truck must be with the permission of the owner, and what occurred on any other occasions can be no evidence here to either refute or support the contention of the plaintiff; and, furthermore, that particular issue, certainly as to agency, is now *res judicata*, if they were trying to make out any agency here. That issue has been fully and definitely settled in the State court action—one issue that was settled there. So I don't see that this would throw any light or give help in deciding the issue before us to go into things happening two years before. I have never gone into this; I don't know what they were.

The Court: He may answer subject to the objection. Read the question, Mr. Reporter.

Mr. Miller: I will ask another one. [13]

Q. Did you go hunting with Dake during the time you were living there at the bunkhouse?

A. No, I don't think so. Not that I remember of.

Q. Did Dake use the truck to go hunting during that time?

A. I think he did a time or two. That was all private road up there where we were.

Q. Did Dake use the truck to go out and pick up guy wires that may have been left with some other operators, chokers, things of that character?

A. A time or two I sent him with it.

(Testimony of Harold Edward Wells.)

Q. A time or two you sent him with it?

A. Yes.

Q. Did he ever use the truck without asking you during that time?

A. No; not that I know of.

Q. Now when you moved over to the other site, then where did you live?

A. Gales Creek.

Q. You lived at Gales Creek?

A. Just out of Gales Creek.

Q. With whom did you live? A. Pardon?

Q. With whom did you live?

A. With Ralph Haskins.

Q. Your operation was about fifteen miles from Gales Creek at that time? [14] A. Roughly.

Q. Roughly? A. Roughly.

Q. And did you use the truck to travel back and forth? A. Yes.

Q. Who drove the truck? A. I did.

Q. Dake ever drive it? A. No.

Q. You always drove it back and forth?

A. Yes.

Q. And during what period of time was that?

A. Well, that was about through the months of February—from February on in 1941.

Q. From February on in '41 or '42?

A. '41.

Q. And you were operating then from February, '41, and still operating there. Is that a fact?

A. Yes.

(Testimony of Harold Edward Wells.)

Q. So you have been operating there for two years? A. Yes.

Q. And did Dake work for you during all that period of time from February, '41, down to and including at least June 28th, the date of the accident, 1942?

A. Well, I am quite sure he did, unless I am mixed up on the [15] dates now. We have jumped around so much down there it is pretty hard for me to keep track of it right offhand.

Q. On February, '41, when you started over on this other site you lived with Ralph Haskins; is that correct? A. Yes.

Q. At Gales Creek? A. Yes.

Q. And where did Dake live?

A. Dake lived at Gales Creek too at that time.

Q. And with whom?

A. With Mrs. Adkins at the telephone office.

Q. Mrs. Adkins at the telephone office. Where was the truck kept at that time?

A. It was kept at Ralph Haskins' place at that time, where I was staying.

Q. Where you were staying?

A. Yes, sir.

Q. For how long a time was it kept there?

A. Well, it was kept there until we moved to Glenwood. It was kept there until we moved to Glenwood.

Q. "Kept there until we moved." Whom do you mean by "we"?

A. That is I and Haskins.

(Testimony of Harold Edward Wells.)

Q. And where is Glenwood with relation to Gales Creek and to your operation?

A. That is about six, seven miles below Gales Creek. [16]

Q. Toward the coast?

A. Yes. Towards Wilson River.

Q. Toward Wilson River and likewise toward your operation? A. Yes.

Q. Now what was done with the truck at that time?

A. It was kept at the telephone office at Gales Creek at that time.

Q. Where did you stay?

A. I stayed at Glenwood.

Q. With Haskins? A. Yes.

Q. Now how many days a week did you work?

A. We worked five days a week.

Q. And what was the practice in going to and from the camp during this period of time from February, 1942, to and including June 28th, or that work week along there, of 1942?

Mr. Powers: May I have an exception to all this line of testimony, your Honor?

The Court: It is all being admitted subject to the objection.

Mr. Powers: Thank you.

The Witness: What was the question?

Mr. Miller: Q. What was the practice going to and from work? How did you get to work?

A. In the pickup.

Q. Who drove the pickup? [17]

(Testimony of Harold Edward Wells.)

A. Well, about any of the men that happened to be available drove it from Glenwood on, after I got out, on up to Gales Creek.

Q. After you got out. Then you are speaking of coming out of the woods at night?

A. Yes; going home.

Q. Going home you would drive it from the——

A. I would drive it from camp down to Glenwood.

Q. That would be roughly how far?

A. Oh, it is——

Q. Eight miles, something like that?

A. Yes; or ten.

Q. Eight, nine, ten miles? A. Yes.

Q. Then you would get off at Glenwood?

A. Then the boys would take the pickup out on up to Gales Creek where they stayed. I furnished them transportation.

Q. What would be the practice in the morning?

A. They would come down with the pickup, pick up a man or two on the way, pick me up at Gales Creek and I drove from there on.

Q. On the week ends did you stay at Haskins'?

A. No; I come home.

Q. And by "home," you mean Oregon City, near Oregon City? A. Yes.

Q. How far is that from Gales Creek? [18]

A. I don't know exact.

Q. Roughly.

A. Well, you got about as good idea of it as I have. I have an idea it is fifty miles, forty-five.

(Testimony of Harold Edward Wells.)

Q. Forty-five, fifty miles. Did that make the additional five miles to Glenwood where you were actually staying? A. Yes.

Q. How did you generally go home to Oregon City?

A. Well, if I rode with Mr. Powell quite a bit of time, my father-in-law. He was logging with us.

Q. Mr. Powell was logging with you?

A. Yes. He is a logging operator.

Q. And he was out there during the work week?

A. Yes; he is there all the time.

Q. And he had the same practice of going home to Oregon City as you say? A. Yes.

Q. On the week end? A. Yes.

Q. That would be Friday evening of each week?

A. Quite a bit of the time, yes.

Q. Now on Friday evening, June 26, 1942, to place it in your mind, that is two days before the accident. A. Uh huh.

Q. Did you go to Oregon City with Mr. Powell? [19]

A. No; I went in my pickup.

Q. You went in the pickup? A. Yes.

Q. Did Mr. Powell go over there that week end to Oregon City?

A. He wasn't available for me to ride with. A lot of times he goes home in the middle of the week, something like that.

Q. You went in the pickup?

A. I didn't have any other way to go home so I took the pickup.

(Testimony of Harold Edward Wells.)

Q. You drove it yourself? A. Yes.

Q. Anyone with you? A. Yes.

Q. Who? A. Charles Dake.

Q. For what purpose?

A. To bring the pickup back to Gales Creek.

Q. What was he going to do with the pickup?

A. Take it back to Gales Creek and leave it there.

Q. Now when he went to Oregon City to your place did you give him anything? A. Yes.

Q. What? A. Gave him a rifle.

Q. For what purpose?

A. He was going to go hunting. [20]

Q. Go hunting for what?

A. I don't know; bear, deer, wild cats; I don't know what he was going to hunt for.

Q. When did you discuss the hunting trip?

A. Well, I guess coming out of the woods.

Q. Friday evening from work you discussed the hunting trip. And what was said and who was present?

A. Three of us was in the front seat of the pickup, Charles Dake, myself, and Corvin Sheldon.

Q. Yes?

A. Sheldon was going back up next day; he was going to do some work on the yarder horns; and Dake decided to go up with him and do a little bit of hunting. So he went home with me and brought the pickup back so it would be there for Sheldon to take up. I wanted it down there anyhow in case of

(Testimony of Harold Edward Wells.)

fire. And I loaned Dake my rifle, which he had used a whole lot before. He has used it more than I have.

Q. He used it hunting up on the other side?

A. On Round Top. I loaned it to any of the boys that worked for me that wanted it.

Q. Would Corvin Sheldon go hunting, too?

A. No, not that I know of.

Q. You say that Corvin Sheldon was to go back up and fix some horns on the yarder?

A. Yes. [21]

Q. How long had they been defective?

A. They had been giving us trouble for a day or two off and on.

Q. When were they fixed?

A. Fixed Monday morning.

Q. How long did it take to fix them?

A. Oh, I don't remember for sure.

Q. Approximately?

A. I have an idea probably a half hour or so.

Q. Probably a half hour to fix it? A. Yes.

Q. And who fixed it?

A. Well, I had a hand in it and I guess Sheldon helped with it; two or three of us.

Q. Where does Corvin Sheldon live?

A. He lives at Forest Grove.

Q. How far is Forest Grove from your operation at that time?

A. I don't know. I drove it every day, too.

Q. Well, Forest Grove is roughly seven miles from Gales Creek, is it not?

(Testimony of Harold Edward Wells.)

A. About seven miles.

Q. I think something like that. So from your operation it would be roughly twenty-two miles?

A. Yes, it would be twenty-two miles.

Q. You were going to have Corvin Sheldon go from Forest Grove back up to the yarder twenty-two miles. And how far would that [22] be in the woods off of the main highway?

A. Oh, about three miles.

Q. And he was going to drive up there and fix the horn——

A. Yes.

Q. ——on Sunday?

A. Yes.

The Court: Fix what?

Mr. Miller: Fix the horn on the yarder.

The Witness: Signal horn.

Q. And that job the next day took you thirty minutes to do?

A. Yes; with the whole crew we had while we were fixing it it was pretty expensive.

Q. What was the size of your crew?

A. I got eight men.

Q. As a matter of fact, weren't Corvin Sheldon and Dake both going to go hunting?

A. Pardon?

Q. Didn't you know that both Corvin and Dake were going to go hunting Sunday?

A. No, I didn't know.

Q. You gave Dake your rifle to go hunting?

A. Yes.

Q. You knew he was going hunting?

(Testimony of Harold Edward Wells.)

A. I had an idea he was. That is why he asked for it for.

Q. Did he get anything? [23]

A. Not that I know of.

Q. You don't know whether he got any deer?

A. No.

Q. Did you go back out to Haskins' after that?

A. Yes.

Q. When were you again at Haskins'?

A. There Monday morning.

Q. And was there deer in the basement at that time?

A. Not that I know anything of.

The Court: Is it out of season?

Q. Was it out of season at that time?

A. Yes.

Q. Did you give Dake shells?

A. No, I didn't.

Q. There were shells in the pickup truck with him?

A. Dake had some shells left from before, I guess, from Astoria. I found out afterwards I didn't.

Q. Found out afterwards what?

A. That I didn't give him any shells.

Q. That you didn't give him any? A. No.

Q. By the way, at the first camp you had a gas pump, did you not? A. Mr. Powell did.

Q. Mr. Powell had a gas pump?

A. Uh huh. [24]

Q. Who was the employer?

(Testimony of Harold Edward Wells.)

A. Mr. Powell.

Q. Who keeps the books?

A. Well, Mr. Powell keeps his books.

Q. Well, he keeps his books. Is he the employer of Dake?

A. No; Dake works for me. I am the contractor under Mr. Powell.

Q. You are the contractor to Mr. Powell. Now who does Dake work for?

A. He works for me.

Q. Who pays him? A. I do.

Q. Well now, you do not keep the books; is that it?

A. I keep books on my crew, on Dake, yes.

Q. You mean just a time book? A. Yes.

Q. Who keeps the books in connection with the gas pump that you had there at the first camp?

A. C. F. Richardson at Milwaukie.

Q. C. F. Richardson at Milwaukie?

A. Yes.

Q. And when gas was used was there a ticket issued, a ticket signed by whoever used the gas?

A. Yes, I guess there was too.

Q. Did you see those tickets?

A. Turned into the office. [25]

Q. Did you see them?

A. Well, most of them I did.

Q. Was Dake's name on several of them?

A. I don't remember of it.

Q. Did Dake have a car of his own at any time that he worked for you?

(Testimony of Harold Edward Wells.)

A. No, he didn't have a car of his own. He and a fellow pulling logs for me run around a lot together, got lots of gas out of the pump.

Q. And likewise got lots of gas for the pickup truck, didn't he? A. May have; I don't know.

Q. And used the truck himself on his own business? A. Used it whenever I told him to.

Q. Used it lots of times when you didn't expressly tell him to; isn't that correct?

A. I don't think so.

Q. When you were living there at the bunk-houses didn't Dake frequently take your truck, probably go off hunting on a day off and maybe come back with some choker chocks or——

A. He asked me for it first.

Q. And he even took it without asking?

A. Not that I know of.

Q. He used it several times, many times during the period of time you were living there at the bunk-house?

A. Yes, he drove it several times, I imagine.

[26]

Q. And do you mean to tell the Court every time he asked you, "May I use the truck?"

A. Absolutely.

Q. There were times, weren't there, that sometimes he asked you and sometimes he didn't ask you but just used it and you knew what he was doing; you knew he was either going hunting or you knew he was going out and probably get some guy wire or——

(Testimony of Harold Edward Wells.)

A. I never give anybody working for me permission to use that pickup without my permission; nobody.

Q. You mean to use that truck; nobody used it without express permission from you?

A. Not that I know of. He was in a position lots of times where he could have used it if he wanted to get into it, but he didn't use it that I know of without my permission.

Q. Well now, you did know that Dake was going hunting on Sunday, June 28th? A. Yes.

Q. And you knew how he was going to go hunting?

A. He was going to ride up with Corvin Sheldon in the woods.

Q. Dake took the truck back to Gales Creek?

A. Yes.

Q. Which is seven miles beyond Forest Grove?

A. Yes.

Q. And Dake had the keys to it?

A. Yes; had to have to drive it. [27]

Q. Yes. Did Dake pick anything else up at your place in Oregon City Friday night, June 26, 1942?

A. It seems to me like I threw an empty gas drum in the back end.

Q. Who did you tell to take those up to the woods?

A. I didn't tell anybody to take them up there but to take them up Monday when we went up, or when Sheldon went up to dump them out.

(Testimony of Harold Edward Wells.)

Q. You say you don't know whether Dake got any deer or not? A. No; no.

Q. You say there would be no deer in the Haskins' place on Monday morning when you got there?

A. Not that I know of.

Q. Did you look?

A. No, I didn't. I went in and changed clothes and went out to go to work.

Q. Did you inquire at any time? A. No.

Q. Didn't your father-in-law, Mr. Powell, tell you that there was deer in the basement of Haskins' place? A. No, he didn't.

Mr. Powers: Now, if the Court please, he has already answered——

The Court: I didn't hear the answer. Go ahead, Mr. Powers.

Mr. Powers: I don't see how any question about deer would enter into this, what somebody told him about a deer in [28] Haskins' basement.

The Court: He may answer subject to the objection.

Mr. Powers: I think he has answered, your Honor.

The Court: I didn't hear it so he will have to answer again. What was the answer of the witness?

A. No, he didn't.

By Mr. Miller:

Q. You were shorthanded in the woods at the time, were you not? A. Uh huh.

Q. Pardon me? A. I was one man.

(Testimony of Harold Edward Wells.)

Q. What kind of man? A. High climber.

Q. Was that gentleman discussed with your crew?

A. Well, they all knew that I wanted a high climber, would hire one if he had come along. I was doing the work myself. I still do it.

Q. Did you ever give any orders that your men could not use the truck? A. Yes.

Q. When?

A. A good many times. I never allowed anybody to use the truck for their pleasure because I had to have it for my work.

Q. The question was, Did you ever give any orders to that effect? [29] A. Yes.

Q. When? A. Lots of times.

Q. Well, can you give us one occasion?

A. No, I can't tell you the date that I did.

Q. Well, any occasion. Can you remember the occasion when you gave the order?

A. Ever since like I have had my men ask me to use it to move with, something like that, I turned them down; I told them I had to have it for my work; if I didn't have it I couldn't work.

Q. You mean since you have been logging, even at your operation at Round Top since 1940, you mean you haven't let your men use that truck to haul furniture?

A. No; not only Haskins, the fellow I lived with; he was moving my furniture as well as his.

Q. You let him use it to haul wood?

A. Yes.

(Testimony of Harold Edward Wells.)

Q. You have let him——

A. That was my wood, too, as well as Haskins' wood.

Q. Let anyone else use it to haul wood?

A. No.

Q. Did Corvin Sheldon use it last week to haul wood for himself?

A. I think he did haul some wood a couple blocks.

Q. Did he ask you for it?

A. Yes. And he had the pickup in his yard at the time. [30]

Q. Well, it is parked now at Corwin Sheldon's yard?

A. It was in his place at the time. Sometimes it is at his house.

Q. Ever let Dake use it to haul any furniture of his?

A. I don't think so.

Q. Don't you recall you let Dake use it to haul furniture from Portland to Forest Grove?

A. I believe I did; I believe I did.

Q. And it was driven in general use, was it not?

Mr. Powers: I will object to that.

The Witness: General?

Mr. Powers: He has been very specific; now, general use. The witness has testified that he never let anybody use it for their private business or their own pleasure, and when Mr. Miller says "general use" he might mean general use around the logging operations or general use by all the employees any

(Testimony of Harold Edward Wells.)

time they wanted to use it. We will object to it on that ground.

The Court: He may answer subject to the objection. What was the answer?

A. No, not generally.

Q. Around the woods it was used by anyone that happened to be handy?

A. Anything I wanted I sent any of the boys that could drive it after it up in the woods.

Q. Any one of the crew? [31] A. Yes.

Q. When you came down out of the woods at night anyone that happened to be in the front seat would drive it from Glenwood on to Gales Creek; is that correct? A. Yes.

Q. The same would be true in the morning?

A. Yes.

Q. Anyone who happened to be in the front seat would drive it?

A. The yarder engineer drove it quite a bit of the time. Dake drove it part of the time.

Q. Mr. Richardson you say keeps the books?

A. Yes.

Q. That is all the books of the Powell operations? A. Yes.

Q. He would have everything that shows Dake's employment?

A. I have got the papers here of his time showing that he never did work for me on Saturday and Sunday.

Q. Do you have the records concerning the gas consumption? A. No, I haven't.

(Testimony of Harold Edward Wells.)

Q. Would it be convenient to have Mr. Richardson bring those here? A. Today?

Q. Yes.

A. Well, I don't have an idea he can get them ready and bring them that quick. He is pretty busy. [32]

Q. He lives where?

A. Lives at Milwaukie.

Q. Will you be good enough to call him and ask him if he can do that?

A. I guess I can. I don't know whether he can or not, but I will try and call him and ask him.

Q. He has all those records that relate to Dake's employment and all the records relating to the operation of the truck, gas consumption?

A. There is no records of the truck; I don't keep any records of it. I put my own gas in it. Might be a record of gas I got at the pump on the other side because that was Mr. Powell's. Ordinarily I buy my own gas and put my own gas in it. I don't keep records of it. I put gas in it whenever it needs it.

Q. There was a record of gas consumed on the other side and by whom it was consumed?

A. Yes. I don't know whether it was.

Q. He has slips on them?

A. Yes, I imagine he has got those slips. I have got a record of Dake's time here if you want it now.

Mr. Miller: I will be glad to have you produce it.

(Testimony of Harold Edward Wells.)

The Court: We will have a short recess, gentlemen.

(Recess.)

The Court: Continue the examination, gentlemen.

Mr. Miller: Q. Mr. Wells, you handed me two sheets of paper [33] upon which there are some figures, and will you tell me who prepared these?

A. Judge Richardson.

Q. He is the one that keeps the books?

A. Yes.

Q. It would appear from just looking at it that that doesn't cover the entire period of time that Mr. Dake worked for you; is that correct?

A. Yes, that does.

Q. It does cover the entire period of time?

A. Yes; I am quite sure.

Q. Well, I understand you to say he worked for you in 1940?

A. Well, I might have been wrong on the dates that he went to work for me. What dates does it show there?

Q. Well, as I view it, it just shows from 10/31/41.

A. On the back side, too?

Q. Well, it apparently goes back as far as July of '41.

A. Well, that must be when he went to work for me then.

Q. It may have been then?

A. It must be.

(Testimony of Harold Edward Wells.)

Q. Mr. Richardson again is the one that keeps the books, however? A. Yes.

Q. How long has he been working for you this last time? A. Oh, about a month.

Q. Mr. Dake was confined to the State Penitentiary for some time; [34] that is correct?

A. Yes.

A. Recently? A. Yes.

Q. And immediately after his release he went to work for you; is that correct? A. Yes.

Q. Doing the same job? A. Yes.

Q. And what is that job? A. Loading.

Q. Head loader, is he? A. Yes.

The Court: Is he out on parole?

A. Yes.

Mr. Miller: Q. Now you have been shut down this week, have you not?

A. Yes.

Q. This past week? A. Yes.

Q. Because of the snow? A. Yes.

Mr. Miller: I think that is all. [35]

Redirect Examination

By Mr. Powers:

Q. Well, Mr. Powers, you stated that Dake had used this truck on other occasions. State to the Court, if you will, whether you ever gave Dake permission to use this truck out on any public road such as where this accident occurred.

A. Since he called my attention to it I think I did let Dake use the truck one time when he first

(Testimony of Harold Edward Wells.)

—shortly after he went to work for me to move some furniture.

Q. That would be how long before this accident?

A. Oh, that was probably pretty close to a year.

Q. About a year before. Other than that did you ever give him any permission to use the truck out on any public road?

A. No. Do you know for sure that I let him use the truck to haul some furniture?

Mr. Miller: I don't know.

The Witness: Well, I don't neither. I am not going to say that until I find out for sure. I may have.

Mr. Powers: Q. Well, what is your recollection about that? Do you know whether you did or not?

A. No, I don't remember of letting him have it. It seemed to me like that he asked me for it. I have some recollection of it but I don't remember.

Q. Well now, you were asked by Mr. Miller whether other employees around there asked you to use that truck and to take it on their [36] own personal business. What is the fact about that? Did you have any rule about that?

A. Well, yes; a rule I don't let them have it.

Q. And what kind of request would they make to use that truck? A. Well, all kinds.

Q. What?

A. All different requests; some of them for one thing and some another.

(Testimony of Harold Edward Wells.)

Q. To haul furniture and things like that?

A. They don't ask me for it very much as a rule because they know I don't want to loan it.

Q. Is it known around there that you wouldn't let anyone take it? A. Yes.

Q. You said that you did let Corvin Sheldon use it last week to haul some wood?

A. I think he did—he had some wood, yes. I was in town, Forest Grove.

Q. Did he ask you whether he could use it?

A. Yes.

Q. You let him use it for that?

A. Yes. I don't know whether he hauled wood.

Q. He asked you? A. Yes.

Q. Then you said you let—Haskins, is it?

A. Yes. [37]

Q. Use it. When was that that he used it?

A. He had moved our stuff from one house to another there in Forest Grove. Then he hauled some of our wood up from Gales Creek up to Forest Grove.

Q. When was that?

A. When the wood was hauled up? It has been about two or three weeks. The wood was my wood. I hauled wood. Like I say, the truck was mine. I sawed and split it myself. It was my wood.

Q. In other words, you let Sheldon use it a week or so ago, according to your testimony, a long time after this accident of Duke's? A. Yes.

Q. Now you referred to private roads and to

(Testimony of Harold Edward Wells.)

public roads when Mr. Miller was talking to you. What is the difference there?

A. Well, up in the woods on a private road. I do a lot of work with it, running back and forth from one side to the other getting this and that and the other. I never hesitate to send anybody to take it because it is up there on Round Top.

Q. Now I will ask you whether you ever let anyone use this truck to go on a pleasure trip; to take it and just go out riding, go to the beach or anything like that?

A. Absolutely not.

Q. You were asked about sending the truck back to Gales Creek after you went to Jennings Lodge on Friday. Why did you want the truck at Gales Creek? [38]

A. Wanted it back down there so in case of fire the boys would have it there; if we get fire in the woods, which we did about a week or so afterwards.

Q. What about the work to be done by Sheldon up in the woods over the week end?

A. I wanted it back so Sheldon could use it. You can't get up in the woods without a car.

Q. Did Dake know that Sheldon was going to use that truck to go up in the woods?

A. Yes.

Q. When was Sheldon to take the truck up in the woods?

A. Saturday morning.

Q. Was it Saturday or Sunday?

A. Saturday or Sunday, I don't remember now which it was. I believe it was—it might have been

(Testimony of Harold Edward Wells.)

Sunday morning. I think if I remember right Sheldon wanted to do something Saturday and he said he would go up Sunday and do it.

Q. You said it took a half hour to repair the yarder up there. How many men had to work on it to repair it?

A. Just two or three boys worked on it but the rest were standing around. You can't do anything when it isn't working.

Q. Well, what is the whistle on the yarder?

A. It is a signal horn for the rigging crew out in the woods. They can't do anything if it isn't working.

Q. Does it work with electricity or steam? [39]

A. Electricity.

Q. How long are the lines that you have to work over in repairing it?

A. I got a thousand feet of cord. I have an idea there is about six, seven joints in the cord. They get out of kilter; the horn got out of kilter.

Q. What was wrong at that time, do you know?

A. I don't know whether—it is pretty hard to trace it. It might have been in the horn or a joint just apart.

Q. What function does the whistle on the yarder perform? Can you work without it?

A. No.

The Court: I understand that. Don't give any more time to that.

Mr. Powers: Yes, your Honor.

(Testimony of Harold Edward Wells.)

Q. Well, I will just ask you this: What was Sheldon's job in the crew?

A. At the time he was working for me?

Q. Was he the engineer?

A. Yes; also the engineer and kind of handy-man on mechanical work.

Q. Was there at that time any restrictions as far as priority is concerned for the use of the truck on the job?

A. Tires was rationed.

Q. State to the Court—— [40]

The Court: That is a pretty good point. Mr. Powers. A man would have a hard time getting permission from me to use my car nowadays with the tire mileage I have left. I am saying that seriously, too.

Mr. Powers: Yes.

The Court: That is a good point in this case.

Mr. Powers: Q. As I understand it, this pick-up truck, you just stated, was the only way that you could get up around in the woods: that you couldn't drive an ordinary car up?

A. No. I have got 40-inch wheels on it; the same size as a logging truck.

Q. You have got what?

A. I have got 40-inch wheels on it; the same size as a logging truck.

Q. And this accident occurred on Sunday, on June 28th. You brought the payroll records in under subpoena, I think, from the defendants, did you not?

A. Yes.

(Testimony of Harold Edward Wells.)

Q. Did Dake get paid anything after Friday, the day that you shut down?

A. No. His pay stopped Friday when we quit work up in the woods.

Q. Yes. Now you carried State Accident Insurance, did you not? A. Yes.

Q. And was there any report made to the State Accident Commission that Dake had been injured on the job? [41]

A. No. He wasn't on the job.

Q. So he got no compensation at all for the time he was laid off after that accident?

A. No.

Q. Well, how well established was this rule around the camp about no one using that truck without your permission?

A. Well, it was quite well known.

Q. Was it known by all those people?

A. Yes.

Q. Was it known by Dake? A. Yes.

Q. And the times that you had let him use it before were in connection with up around the camp? A. Most of the time.

Q. You had sent him to do some errand for you there? A. Yes.

Q. And because of—what did you say about wanting it there in case of fire? Was that the fire season? A. Yes.

Q. Was it necessary to have it right at Gales Creek for that reason?

(Testimony of Harold Edward Wells.)

A. Pretty near always some of my men stayed there over the week end and if they got fire up in the woods they could be up there way before I could get down there; and we did have a pretty bad fire last summer shortly after this accident.

[42]

Q. How long after this accident?

A. I think the fire broke out the day of the Fourth of July.

Q. Well, to summarize, then, was this truck used for anything but business purposes, with your permission? I mean, would you let anyone use it for anything other than business? A. No.

Q. What kind of work does Mr. Dake do for you now? A. Head loader.

Q. Is that important work around logging?

A. Yes. It is hard to get a man. I never did replace him the whole time he was gone.

Q. Do you work getting out logs now if the weather permits? A. Yes.

Q. Getting out logs? A. Yes.

Mr. Powers: I believe that is all.

Recross Examination

By Mr. Miller:

Q. Those business purposes that you spoke of, was it necessary to get your permission to drive the truck? A. Yes.

Q. You sent it back out there so it would be there Sunday in the event of fire or something?

A. Yes.

Q. You wanted it there for emergency purposes?

(Testimony of Harold Edward Wells.)

A. So Sheldon can use it too. [43]

Q. If there was fire would somebody have to call you up?

A. No. If there was fire they would take it and go on up there.

Q. Now on this ration order, what kind of card do you have on that truck? "C" card?

A. No; it is a "T" card.

Q. "T" Card?

A. They wasn't in effect then.

Q. It wasn't in effect then. You had an unlimited supply of gas? A. Not at that time.

Q. What about your tires?

A. Tires were rationed.

Q. They were rationed. But do you get tires for your truck? A. Yes.

Q. Have you got them?

A. Yes, I can get tires for them, and have got them.

Q. Logging has priority; is that correct?

A. Yes.

Q. Get them at any time? A. Yes.

Q. These pay roll records you speak of, you say they were produced at my request, you were subpoenaed to bring those?

A. Yes. That is the records Mr. Richardson fixed up for me at the trial in Astoria. I kept them and I was requested to bring them down there. [44]

Q. Oh, I see; the trial at Astoria. You say you have no truck records of any sort? A. No.

(Testimony of Harold Edward Wells.)

Q. Did Richardson keep any?

A. No, I don't think any outside of some expenses maybe for repair work like that, charged it up to my logging work.

Q. Your summarization of this whole thing is Dake stole the truck, is that right, on this Sunday? A. Took it without my permission.

Mr. Miller: That is all, your Honor.

Mr. Powers: That is all, Mr. Wells.

The Court: Step down.

(Witness excused.) [45]

CHARLES M. DAKE

was called as a witness in behalf of the defendants, and, having been duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name, please.

The Witness: Charles M. Dake.

Direct Examination

By Mr. Miller:

Q. Your name is Charles M. Dake?

A. Yes, sir.

Q. Mr. Dake, are you working now?

A. Yes, sir.

Q. And where are you working?

A. I am working at the shipyards right at the present time.

(Testimony of Charles M. Dake.)

Q. And what shipyards?

A. At—wait a minute; Commercial.

Q. And what shift are you working? [48]

The Court: I don't know if you like it; lots of people don't but if your throat chokes up on you (handing cough drop to witness)——

Mr. Miller: Thank you, your Honor.

Q. Work the graveyard shift, you have been working all night?

A. That is right; got off out there at 8 o'clock this morning.

Q. Got off at 8 o'clock this morning and came right here to the courthouse; is that correct?

A. Yes, sir.

Q. How long have you been working there?

A. Went to work Sunday night.

Q. Sunday night? A. Yes.

Q. As soon as the camp shut down, is that correct, or soon after that?

A. No; I went to work just a few days after the camp shut down.

Q. Now, Mr. Dake, you have worked for Harold E. Wells? A. Yes.

Q. How long a time did you work for Wells?

A. I worked—I went to work for him——

The Court: Are you going back to work for him after—when the camp opens?

A. I am just working down there temporary now.

(Testimony of Charles M. Dake.)

The Court: You expect to go back to work for Wells? A. Yes. I am supposed to be frozen.

[49]

The Court: Yes, I see. Well, this is a kind of personal question but I know you won't mind it: Are you paroled to him?

A. Yes.

The Court: Is one of the conditions that you work for him?

A. No.

The Court: How long is the period of your parole?

A. Seven months.

Mr. Miller: Q. The questions is how long have you worked for Wells? Approximately two years, is that correct?

A. Yes. I went to work, I think it was the 21st of June—or July, rather, in '41.

Q. In '41? A. I think it was; '41.

Q. And your job is that of head loader?

A. Head loader.

Q. And that is the same job you have had at all times? A. Yes.

Q. Of course, for a period of time from June 28th until just recently you were not employed by him? A. No.

The Court: What is your age?

A. Thirty-eight.

The Court: Have you ever been married?

A. Yes.

(Testimony of Charles M. Dake.)

The Court: Oh, yes, there was some reference to that. [50]

Mr. Miller: Q. You divorced now; you have children?

A. I have a daughter and granddaughter.

Q. How old is your daughter?

A. Twenty.

Q. A granddaughter, you say? A. Yes.

Q. Now when you first went to work for Wells that was on Round Top? A. Yes.

Q. In fact, the entire operation has been on Round Top, or just on two sides of Round Top; is that correct?

A. Yes, you might say it was two sides. When I first went to work for him he had a camp on top of Round Top.

Q. Now Mr. Wells has testified. You heard him this morning? A. Yes.

Q. And he testified that for a period of two or three months or so that you and one or two others lived in a bunkhouse right somewhere up near the first operation, first site? A. Yes.

Q. That is the fact, is it? A. Yes.

Q. And Mr. Wells likewise testified that the same truck, International pickup truck, was there and was used. A. Yes.

Q. Now will you tell us if you used that truck at that time? [51]

A. I used it to go hunting.

Q. Used it to go hunting? A. Yes.

Q. Did you go hunting many times?

(Testimony of Charles M. Dake.)

A. Go several week ends up there.

Q. Several week ends? A. Yes.

Q. Did you ask Mr. Wells if you might use the truck?

A. Sometimes. Sometimes I didn't.

Q. Sometimes you did and sometimes you didn't. Was he there generally when you used it?

A. No; sometimes he was, sometimes he wasn't.

Q. Your answer was, Sometimes he was and sometimes he wasn't; is that correct?

A. I said, Sometimes he wasn't there; he was gone home over the week end. Sometimes I used it when he was in camp during the week end.

Q. Now did you—I believe you said you used it on some occasions without asking him?

A. Yes.

Q. Was he there on some of those occasions?

A. Well now, I don't know for sure about that part of it, but I know if I had wanted to use it I went out and used it, because I didn't think anything wrong about it, working there.

Q. If you wanted to use it you just went and used it. [52] A. Yes.

Q. And you would use it for what purpose?

A. About all I did was to go hunting. Of course, if I happened to see something could be used I always picked it up.

Q. And by that you mean what, guy wires or chokers, things of that character? A. Yes.

Q. And around that country there had been other operations that had——

(Testimony of Charles M. Dake.)

A. Oh, lots of them.

Q. Wait a minute.

A. Quite a few had been.

Q. —burned over and cut over lands?

A. Yes.

Q. And there were operations that no longer operated; is that correct? A. Yes.

Q. How often would you say you used that truck during that period of time?

A. Oh, it is hard to say. I wasn't in camp every week end myself. During hunting season I used it quite often.

Q. Well, by "quite often," would you say you used it as many as a dozen times, would you say?

A. No, I wouldn't say a dozen times during hunting season, but I might have used it a dozen times altogether the time I [53] lived there.

Q. Sometimes you asked and sometimes you didn't ask? A. Yes.

Q. Now, when you went hunting whose gun did you use? A. I used Mr. Wells'.

Q. In this use of the truck and gun on Round Top there in the first operation when you would go hunting, do you recall of sometimes telling Mr. Wells that you were going to go hunting?

Mr. Powers: Now that is all leading, your Honor. It is his witness and he ought to ask him facts.

The Court: Go ahead; ask the question again.

Mr. Miller: Q. Will you tell us in your own words about the use of the truck on Round Top

(Testimony of Charles M. Dake.)

when you were speaking of going hunting or the use on other occasions. Now we are talking about the first site, the first operation when you were living at the bunkhouse.

A. Well, if I happened to be in camp over the week end and I wanted to go hunting I always took the pickup; if it hadn't been there and Mr. Powell's pickup happened to be in camp I would use it; I wouldn't figure there was anything wrong about it.

Mr. Powers: Now we move that answer be stricken, as to whether there was anything wrong about it. I think we ought to get the facts as to whether he asked permission to take the truck when Wells was there; of course, Mr. Powell's truck isn't involved here at all, as I understand it; and the number [54] of times, if it is material here at all, he used that truck in the year before when they were working on the other side, whether he ever took it when Mr. Wells was there without asking Wells' permission.

The Court: It may remain subject to the objection.

Mr. Miller: Q. Did you buy gas for the truck?

A. I have put gas in it.

Q. You put gas in it? A. Yes.

Q. On more than one occasion?

A. Oh, a time or two.

Q. And when you put gas in it where did you get the gas?

(Testimony of Charles M. Dake.)

A. I bought it there from the gas pump.

Q. You bought it from the gas pump?

A. Yes.

Q. And that is on Round Top? A. Yes.

Q. And in what manner would you buy it; how did you finance payment for it?

A. Whoever had the keys to the pump would tell them I would like to have five gallons of gas and they pumped it in and charged me for it.

Q. Charged you for it? A. Yes.

Q. And then how was it paid?

A. Come off the pay roll. [55]

Q. Would be deducted from your check at the end of the month? A. Yes.

Q. How often were you paid, every two weeks or what?

A. It come out on the next payday. Paid every two weeks.

Q. On the next payday it would be deducted. Would there be an itemization showing that?

A. Showed commissary; we had a commissary there, bought tobacco there; showed cigarettes, tobacco, candy, gasoline, whatever you bought, the same as any other commissary in camp.

Q. You bought gas for the truck and put it in the truck? A. I have.

Q. And then what use was made of the truck on those occasions?

A. Well, one time especially I went hunting up on—we didn't get anything and we come back and were kind of low in spirits and I drove it down to

(Testimony of Charles M. Dake.)

Timber and got half a case of beer, and I don't think Mr. Wells knew anything about that.

Q. You bought gas for it and signed the ticket for it?

A. I bought gas and charged for it.

Q. Did you have any other car there at that time?

A. A friend of mine had a car there.

Q. Yes. You have on occasion bought gas for that car?

A. I have for it, too.

Q. Can you remember who in particular was present when you bought that gas and had it pumped into the truck?

A. Why, I don't know. I think as a general rule it was the [56] fire warden had the keys over the week end.

Q. The fire warden?

A. He would make out a ticket and turn it in to the bookkeeper.

Q. Who was that?

A. Who?

Q. The fire warden.

A. I don't remember what his name is. He is in the room now but I don't remember what his name is.

Q. Now after you moved to the other side Mr. Wells testified you lived at the telephone office, or Mrs. Adkins' place at Gales Creek, and that that was roughly fifteen miles from the logging operation, and for a short period of time he lived with Mr. Haskins at Gales Creek and then a short while later he moved, Mr. Haskins moved and Mr. Wells

(Testimony of Charles M. Dake.)

likewise moved, down near Glenwood, which is about ten miles from the operation. Now, Mr. Wells likewise testified the manner in which he went to and from work; that from Adkins place up to the logging operation about fifteen miles in the morning that whoever happened to be at Adkins would drive the truck down to Glenwood and there pick up Mr. Wells and then perhaps he was the one that drove from there on up to the woods, and the same was true at night going out, Mr. Wells would drive the truck down to Glenwood and get off and whoever happened to be in the seat would drive on down to Adkins place; is that a correct statement?

A. Yes. [57]

Q. Now, the truck, then, at least in June of 1942, was left at Adkins; is that right?

A. Well, a good measure of the time. Sometimes it wasn't.

Q. A good share of the time it was left there?

A. After moved to Glenwood.

Q. How long a time had it been left there; how many months, approximately?

A. I don't remember what time Haskins moved up to Glenwood. Might have been a couple months anyway.

Q. Couple months anyway. That would be May and June, anyhow, of 1942?

A. Well, yes; anyway that long.

Q. Now did you drive the truck during that period of time?

A. Well, I went fishing a couple of times; I never

(Testimony of Charles M. Dake.)

asked Mr. Wells. I took it fishing after supper; drove it up the road about a mile to fish. I didn't ask him anything about it.

Q. Now on Friday, June 26th of 1942 did you discuss with Corvin Sheldon and Mr. Wells the possibility of going hunting that week end?

A. Yes.

Q. And if you will just tell his Honor what was discussed and tell him what occurred at that time.

A. Well,—

Mr. Powers: We will ask an exception to this, your Honor; it wouldn't be binding on us, we weren't there, purely conversa- [58] tion and all hearsay, not proper competent evidence; it doesn't tend to prove or disprove the issue here, whether the actual use of the truck at the time of this accident was with the permission of Wells.

Mr. Miller: Q. Was Mr. Wells there?

A. Yes.

Q. And there was a discussion there between—

Mr. Powers: You said Mr. Wells was there?

Mr. Miller: Corvin Sheldon, Harold Wells and yourself.

Mr. Powers: Make the same objection.

The Court: Admitted subject to the objection.

Mr. Powers: Thank you.

Mr. Miller: Q. You just tell his Honor what was discussed about hunting, what was said between Corvin, Mr. Wells and yourself.

A. Well, we got talking, been talking about hunting, and I wanted to know if he wanted to go

(Testimony of Charles M. Dake.)

hunting over the week end; he said, Yes. I didn't have no gun; so I said I would borrow Mr. Wells' gun, ask him for it; he said he didn't have it up there, he said it was home. So he said if I would take him home I could bring the pickup back and bring the gun back, bring the pickup back to Gales Creek, which I did.

Q. Who suggested you go hunting?

A. Well, we had been talking about it quite a while, you see, every morning we went to work. [59]

Q. Did Corvin decide? Did Corvin Sheldon decide to go hunting, too?

A. That is what I understood him to tell me.

The Court: What were you going to hunt?

A. Going deer hunting.

The Court: Deer hunting.

Mr. Miller: Q. Now when you drove—you understood that Corvin Sheldon was going deer hunting too, is that correct?

A. I understood him that way.

Q. And when you drove down out of the woods that night did you stop at Glenwood where Mr. Wells was staying? A. Yes.

Q. And did he get off there? A. Yes.

Q. Then what arrangement was made to again pick him up?

A. Well, he was going to change clothes and eat supper and I was going to change clothes and eat supper before we left. So I went on down and ate my supper and changed my clothes and drove the

(Testimony of Charles M. Dake.)

pickup back to Glenwood and got Mr. Wells and he drove it on to Oregon City.

Q. Now was it discussed between you and Corvin Sheldon when you were going down out of the woods and in the presence of Mr. Wells when you and Corvin Sheldon should meet to go hunting?

Mr. Powers: It is all leading, when you should meet to go hunting. [60]

Mr. Miller: If.

The Court: He may answer.

A. I understood we was going to meet in the early Sunday morning.

Q. You understood from the discussion, is that it, he was to meet you early Sunday morning?

A. That was what plans Corvin and I had made.

Q. Did you drive Mr. Wells then to his home?

A. He drove it from Glenwood to Oregon City.

Q. That was on Friday evening——

A. Yes.

Q. ——the 26th of June, 1942. Did you get his gun? A. Yes.

Q. Gave you his gun? A. Yes.

Q. To go hunting? A. Yes.

Q. And did he know in what manner you were going to go hunting, how you were going to get to wherever you were going hunting?

Mr. Powers: I think he should tell what occurred, if it is competent at all, about what was said and let the Court draw some conclusion rather than

(Testimony of Charles M. Dake.)

the witness from any actual conversation that may have been had. We would like to save an exception to this entire line of testimony on the grounds heretofore stated and on the further ground that it is just a repetition of everything that has occurred in the state court [61] proceedings; that has all been gone over.

The Court: Continue.

Mr. Miller: Q. Was it discussed between Mr. Wells and yourself how you were going to go hunting?

A. I was going to go up in the pickup.

Q. Was that discussed?

A. We talked; that is the reason we thought of—I thought that was the reason he was bringing it back, for one purpose.

Q. Now at Jennings Lodge, Oregon City, or wherever Mr. Wells lived, he gave you the gun. Did you get anything else there?

A. Well, I picked up a couple gasoline drums, empty ones.

Q. Now there has been some testimony about a horn on the yarder that wasn't working. Was that discussed between Corvin Sheldon and Mr. Wells and yourself?

A. Well, we talked about it and said we would fix that horn when we went up there hunting.

Q. You would fix the horn when you went up there hunting?

A. Yes.

Q. Now on Sunday morning did Corvin Sheldon show up to go hunting?

A. I didn't see him.

(Testimony of Charles M. Dake.)

Q. What did you do Sunday morning; just tell the Court what you did.

A. Well, I got up—I was supposed to go early and I got up and waited there and he didn't show up and I took the gun and [62] pickup and went on up in the woods.

Q. In the pickup? A. Yes.

Q. Did you go hunting? A. Yes.

Q. Where did you hunt?

A. Hunted up on Round Top.

Q. You say you hunted up on Round Top?

A. Yes.

Q. How far did you have to drive——

A. Oh, I think——

Q. ——from Gales Creek?

A. It is about fifteen miles or so from Gales Creek up to the donkey. I drove up there first.

Q. And about twelve miles of that is on the main highway, isn't it?

A. Yes; right around that. I drove up—went up to the donkey setting first.

Q. You went up to the donkey setting first. Did you hunt there? A. Yes.

Q. Did you get anything? A. No.

Q. Did you hunt anywhere else?

A. I hunted over on another road.

Q. Did you get anything there? [63]

Mr. Powers: We will object to that, that it doesn't tend to prove or disprove anything in this case, where a man goes hunting and whether he got anything. It certainly doesn't go to the question of

(Testimony of Charles M. Dake.)

the actual use of this car at the time this accident occurred that night with the other people in the car and after the man had been down to the coast.

The Court: He may continue subject to the objection.

Mr. Miller: Would you read the question, please.

(Last question read.)

Mr. Miller: Q. That is at the second place.

A. The second? No.

Q. You drove around several places looking for deer; is that correct? A. Yes.

Q. Did you finally get some deer?

Mr. Powers: Now we will object to that, your Honor; just trying to embarrass the witness, I assume.

Mr. Miller: I am not trying to embarrass the witness at all. I am trying to bring out the whole story for his Honor.

The Court: Did you get a deer? A. Yes.

The Court: How many did you get?

A. I killed a couple.

Mr. Miller: Q. Pardon?

A. I think I killed a couple. [64]

Q. And then what did you do after you killed those two? A. I come out of the woods.

Q. And where did you take the deer?

A. Well, I took them down and left them.

Q. Where?

A. Well, I don't like to say where I left them.

Q. Where did you leave—if you will answer this

(Testimony of Charles M. Dake.)

question: Did you leave one of them with Mr. Haskins? A. I don't like to answer.

The Court: He doesn't have to answer.

Mr. Miller: Q. Did you make a phone call to Mr. Powell on that day, that Sunday?

A. Let's see, I don't know; I think I did; I don't know for sure.

Q. And what was the nature of the phone call?

Mr. Powers: Well, he says he doesn't know for sure whether he made a call or not.

Mr. Miller: Q. I thought you said you thought you did.

A. I said I didn't know for sure whether that was——

Q. Was it your best recollection you did make a call?

A. Well, I could have; I might have that day.

Q. What is your best recollection?

A. Well, now, I wouldn't just exactly say just for sure on that on that day.

Q. Then do you have some other time in mind that you made a phone call? [65]

A. I have called him at different times to find out about work and things like that.

Q. The thing I had in mind that you called him about was a deer. A. No.

Q. Didn't make a phone call and tell him there was something in Haskins' basement? A. No.

Q. You don't recall that?

A. No, not that I remember of.

(Testimony of Charles M. Dake.)

Q. Well then what did you do after you disposed of the two deer; then what did you do?

A. Well, I came down to—back down to Gales Creek.

Q. And what time was that, approximately?

A. Oh, I don't—it was right around 10 o'clock, something like that, when I got back down to the boarding house.

Q. How were you dressed, work clothes?

A. Work clothes.

Q. Then what did you do when you got back down to the boarding house?

A. Well, Mrs. Adkins' family was coming in for dinner and I didn't want to be around there with the whole family so I asked her if she would fix me something I could eat—I just had all my lower teeth pulled out the day before—so she fixed me some soup, and I went out and put the gun in the car and left.

Q. You had the gun—you took the gun in the house when you [66] returned, then?

A. I don't know whether I took it in the house or not, but I think—I know I took it out of the pickup but I don't know whether I took it in the house or the wood shed.

Q. After you got lunch and got the gun and went back and got the truck——

A. Yes.

Q. —what were you going to do then?

Mr. Powers: Well, if he did anything.

Mr. Miller: Q. If anything.

A. Well, I was going to go out hunting.

(Testimony of Charles M. Dake.)

Q. Started off to go hunting again?

Mr. Powers: That is all leading. Just ask him what he did.

Mr. Miller: Q. Well, just tell his Honor what you did, from where you started, what you were going to do, what you did.

A. I started to go hunting and I got about a mile, mile and a half, I guess, from Gales Creek and I seen a couple—two men and a woman walking along the road and I stopped and picked them up and ask them where they was going. They said they was going to Tillamook. I told them I didn't think I could go that far; didn't right at the time. So I drove on up the road a ways and I decided I would go on to Tillamook too. I didn't have no intentions of going over there at the time. So I took them over to Tillamook. And I thought, Well, I had the gun along, maybe I might see something too. Went over to my uncle's place [67] and stayed over there for a while, and I had a cousin over there I wanted to see, and he wasn't home so we ate lunch there and I stayed—I don't know just how long we was there. Anyway we left and I thought, We will go back around the other road and come across the Wolf Creek. We stopped up at Twin Rocks for quite some time, and left there and started on back to Gales Creek and it was after night and, oh, it was I don't know just how far that is. Anyway it is where that overhead crossing of the Oregon-American—where the Oregon-American overhead crossing crosses the highway, we just

(Testimony of Charles M. Dake.)

passed that where we had the collision, and from there, why, I went to the hospital.

Q. When you started off the second time you were going to do some more hunting?

Mr. Powers: Now we will object to that. He has been over it and he is suggesting he was going to do more hunting.

Mr. Miller: I am not suggesting. I understood you to say that.

Mr. Powers: I think it is improper. It is direct examination, your Honor, and for reasons that are going to be developed here I think it is all the more improper. Counsel has seen the record before. This is a new element that he is suggesting into it.

Mr. Miller: I didn't get the remark.

Mr. Powers: I said you have been all over this record, you [68] know what happened before. It was your contention before he was going down to hire somebody looking for work, looking for somebody that might want to work up there. You have got this new element injected in here now he was going hunting. You took his deposition; you heard his testimony before.

Mr. Miller: All I am trying to get is the true facts. I think that is what the witness is now telling the Court.

Mr. Powers: I am objecting to it specifically on the ground it is leading, your Honor.

The Court: Go ahead. It seems to me he is developing it all right; slowly but all right.

(Testimony of Charles M. Dake.)

Mr. Miller: Q. I believe you said you were going—put the gun back in the car and started off again——

Mr. Powers: I object to that, too. He can ask him what was done.

Mr. Miller: May I finish the question?

The Court: Start over again. You will have to untangle the lawyers.

Mr. Miller: ——started off the second time really did you intend to go hunting?

A. What I intended when I left Gales Creek, I intended to go back up on Round Top; that is where I was headed for.

Q. And did you intend to take another road in there; is that the——

A. Well, I was planning on going around—to tell you I never [69] did say just the exact reason for going up there, but I was—I went up there—I knew where there was an iron camp cot and it had been left up there from logging before and it was in good shape and I knew where that was at and I knew it was pretty good; so I intended to go after that and on the way I met these people, started to pass them and I picked them up. I told them I would take them as far as I was going, and at the time I got as far as I was going I got the intention to go on to Tillamook, too; so that is the way I gone to Tillamook.

Q. How far was Tillamook from this point where you intended to turn off?

A. Oh, it must be forty miles, I should judge. I

(Testimony of Charles M. Dake.)

wouldn't say for exact mileage, somewhere in the neighborhood of forty miles.

Q. Did you use the pickup truck on Saturday, June 27th? A. Yes.

Q. For your own personal use? A. Yes.

Q. What was the nature of that use?

A. My teeth had been bothering me for some time and I finally got up nerve enough to have them pulled and I went down to Hillsboro to the dentist's and had all my lower teeth pulled out Saturday morning.

Q. Did Wells know about that?

A. No, I didn't tell him anything about it; didn't know it until Monday morning when I come to work, I come to work with- [70] out any teeth.

Q. And you drove over to Tillamook—by the way, had there been discussion between Mr. Wells and yourself and other members of the crew regarding the shortage of help in the woods?

A. Oh, yes, we had talked about it ever since we lost the rigging sling.

Q. Was Wells anxious to get a man for that job?

Mr. Powers: We will object to that, your Honor.

Mr. Miller: My point is there, your Honor, that I would believe that the Astoria case would decide the issue as to agency, as to whether or not Mr. Dake at the time of the trip was an agent of Wells; and that, as I see it, was the issue in the Astoria case, and, of course, I believe that is *res judicata* here, and I just want to tell the Court about it and

(Testimony of Charles M. Dake.)

I don't care to go into it unless Mr. Powers intends to make an issue about it. I think the only question here is the one as to permission, permissive use. There was a lot of testimony, as Mr. Powers stated, in the Astoria case, and he has offered that testimony in evidence regarding the agency feature. There has been an adjudication on it in Astoria and I think that was the issue in Astoria as against Wells. There is no question about that.

The Court: Well then, agency is the broader concept.

Mr. Miller: As I see it, under our state court decisions, that the only way in which Wells could be responsible in the [71] state court was the finding he was *respondiat superior*, and at the time——

The Court: He went over that the other day; the jury found it was and Judge Peters set it aside.

Mr. Miller: And the finding in the state court case that Mr. Dake was using the truck with permission, of course, would have been a moot question, that wouldn't have decided anything as against any of the parties in the state court case.

The Court: That is what I was driving at; I asked if agency is the broader concept than permission.

Mr. Miller: Yes.

The Court: Well, go ahead; let's get this man's story here. Can't you light out here and tell your own story? You have been examined a lot of times.

Mr. Miller: I would be glad to have you do it.

(Testimony of Charles M. Dake.)

The Court: Tell why you went down here. I read the facts you gave before. You said in your deposition you took a shine to one of the women is why you went on.

A. That is the reason I went on after I picked them up.

The Court: And you did some drinking down there?

A. Yes.

The Court: And you said something in your deposition about a man down there. Did that have anything to do with it?

A. Well, I had a cousin that I figured if he had—he wasn't working, if he had—if he wouldn't go up and go to work. I [72] knew Mr. Wells would take him if he hadn't got work himself. I got down there and he was—he was already working in the shipyards.

The Court: You said a minute ago, having a gun, you thought you might also see something to shoot down there.

A. I had that in mind when I started out.

The Court: I know, but after you started to go to Tillamook you didn't have any use for the gun then.

A. Couldn't take it out after I had seen them along the road there without coming back. I figured if one jumped out in front of the car I would go get him.

The Court: Really you changed your plan and

(Testimony of Charles M. Dake.)

went on down to Tillamook on account of running into these girls; was that it?

A. That is the main reason I went to Tillamook.

The Court: Did you have any further questions?

The Witness: If I hadn't picked them up I wouldn't have went to Tillamook.

The Court: No. Any further questions? Isn't that the whole story?

Mr. Miller: With this one or two exceptions.

Q. Did Mr. Wells ever tell you that you couldn't use the truck at any time?

A. Well, I don't know as he ever took and told me unless since I have been back.

Q. Since you have been back he told you you can't use it? [73]

A. Yes.

Q. You used it on many, many occasions before; is that correct?

A. I used it, drove it several times.

Q. Was it understood that Mr. Wells was to get some of the deer meat if you got some?

A. Well, I was supposed to give everybody some if I had had a chance; but I landed in the hospital and I didn't get a chance to cut it up.

Q. Mr. Wells understood that?

Mr. Powers: We object to what Mr. Wells might have understood. You might ask him whether he told Mr. Wells he would give it to him; or something. What he understood, that is a little too indefinite.

(Testimony of Charles M. Dake.)

The Court: Well, I have my own ideas about it, only I never get any deer meat. What is understood and what you get is a different thing. Somebody else always gets their first.

Mr. Miller: Q. Were you going to answer that question?

A. Well, I don't know what the question was.

The Court: Wells knew you were going deer hunting. Was he expecting you, if you had luck, to give him part of the meat? Were you expecting to give him part of the meat?

A. Well, I expected—I think he expected to get some of it the same as all the rest of the boys if I got a chance to give it to him.

Mr. Miller: I think that is all. [74]

The Witness: I give it to everybody in the camp.

Cross Examination

By Mr. Powers:

Q. You have been working all night and your voice is not up to standard?

A. Yesterday I couldn't answer any of your questions very handy, and the day before.

The Court: Probably you will be in the same fix tomorrow. This won't do you any good.

Mr. Powers: Q. Mr. Dake, you first were working on the other side of Round Top when you went to work in July, 1941; is that right?

A. Yes.

Q. And you have testified that you used the

(Testimony of Charles M. Dake.)

pickup truck over there on several occasions to go hunting. A. Yes.

Q. And then you said that you used it on one occasion to go down to Timber, I think, to get some beer. A. Right.

Q. And you said that Mr. Wells didn't know about your taking it down to Timber; is that right?

A. Well, I didn't tell him nothing about that.

Q. And that sometimes you took the truck to go hunting when Mr. Wells was there and sometimes you took it when he wasn't there, on the other side of the mountain where you first worked. [75] Did you ever take it when he was there without asking his permission?

A. Well, I don't know for sure about that, but I know if he was—happened to be out some place and I took a notion to go and it was in camp, I would get the gun and take off with it.

Q. Let me ask you this, though: When Mr. Wells was at camp when you were ready to go hunting, did you ever take that truck without asking his permission?

A. Well, I wouldn't say I did or I didn't because I don't remember. Just as I say, if I had wanted to take it I would have took it without asking him. I could have got back, but I would have took it; I would have figured it would have been all right because I had used it to hunt anyway.

Q. This was especially good for the timber country, wasn't it, the truck? A. That is right.

(Testimony of Charles M. Dake.)

Q. And you say that time, which was a year before the accident, was when you were working over on the other side, on the other job?

A. Yes.

Q. And the only use you put it to was to go hunting there around the camp on the mountain; is that right? A. Well, you mean me?

Q. Yes, you; when you used it.

A. Yes, I did one time. [76]

A. Yes, I did one time.

Q. When you went down to Timber it was without his knowing it? A. Yes.

Q. Then there was a gas pump over there, wasn't there? A. Yes.

Q. And when you left that job and came over on the other side there was no gas pump, was there?

A. No.

Q. So any gas you bought was on the other job; is that right? A. Yes.

Q. And you say you may have put some gas in the truck over there a time or two?

The Court: How about the gas you used on this Sunday? Let's have the fact about that.

Mr. Powers: I will come to that, your Honor.

Q. You had a friend over there that had a car, on the other side of the mountain, didn't you, that you and he used to buy gas for? A. Yes.

Q. You bought quite a bit of gas for that car from time to time; isn't that a fact?

A. Well, I bought some; I don't know how much.

(Testimony of Charles M. Dake.)

Q. You bought a lot more for the car than you did for the truck?

A. We generally split fifty-fifty on the gas when we come into town.

Q. Your friend and you, when you used that other car? [77] A. Yes.

Q. You would make out this same kind of ticket you are talking about? A. Yes.

Q. Now when you left Wells, which was on Friday night two days before this accident, and you left at Oregon City or Jennings Lodge, wherever he lives; is that right? A. Yes.

Q. You testified he told you to take the truck back to Gales Creek; is that right? A. Yes.

Q. And did you take it back there?

A. I took it back to Gales Creek.

Q. Yes. Now what is the fact as to whether Sheldon, I think his name is, Corvin Sheldon, was to repair the yarder whistle on Sunday?

A. Well, I don't know whether he was—Mr. Wells give any orders to that effect or not, but then I know that Sheldon said we would fix the whistle when we went up hunting; but Sheldon and me was going to go hunting together, and we always figured on fixing that whistle while we was up there.

Q. Wasn't Sheldon to have the use of that truck that day to go up there to fix that whistle, to start out Sunday morning?

A. I didn't understand it that way.

(Testimony of Charles M. Dake.)

Q. Hadn't you testified to that effect in your deposition and [78] also on the trial——

A. Well, I say there was two of us and I don't know whether I was supposed to drive it from Gales Creek up there or whether he was supposed to, as far as that goes.

Q. Well, yes; but didn't you testify——

A. As a general rule, yes, he drove because he was a better driver than I was.

Q. Yes; but wasn't it a fact that the truck was up there so Sheldon could take it up to fix that whistle and you were going to go along to ride so you could go hunting?

A. Yes; and there was another agreement between Sheldon and I, if he was not there I would take it and go anyway.

Q. That was between you and Sheldon?

A. Yes.

Q. But that wasn't between you and Wells then, was it?

A. Well, I don't know whether Wells knew anything about it or not.

Q. No. Well, your understanding with Wells was that Sheldon was going to take that truck up to fix the whistle and you were going to ride up with him to go hunting, wasn't it?

A. He didn't tell me I couldn't drive it.

Q. But isn't that what was said there in the truck, that Sheldon was to go up Sunday morning to fix the whistle and you wanted to go along so you

(Testimony of Charles M. Dake.)

could ride up there to go hunting; that was the reason you went over and got the gun? [79]

A. He and I was going to go hunting; he and I was going to go hunting together.

Q. You and Sheldon? A. Yes.

Q. But what I am asking you about now is about Wells' arrangement there. He told you to take the truck back to Gales Creek, didn't he?

A. Yes.

Q. And you took it back? A. Yes.

Q. Wasn't your understanding with Wells that Sheldon would go up there and fix the whistle and you were going to ride up with him because you wanted to go hunting?

A. My understanding of it was Sheldon and I was going to go hunting and we was going to fix the whistle. There was no—I don't know whether Sheldon was supposed to be paid additional for the job or not. I don't know whether he had any orders to that effect.

Q. You said that it was your understanding with Sheldon a while ago you two were going to go hunting; is that right? A. Sure.

Q. Did you have that understanding with Wells?

A. I don't know whether I said anything to Wells about it or not.

Q. I will ask you this: Isn't it a fact that Wells, in your presence there, made arrangements with Sheldon to take the truck [80] up on Sunday morning to get that whistle working?

A. Well, now, as I said before, I don't know

(Testimony of Charles M. Dake.)

for sure. As I told you, I didn't hear him give Sheldon any orders to that effect.

Q. Well, let's see.

A. He didn't tell me every time he gives a man an order.

The Court: Did you have a lawyer in Astoria when you pleaded guilty?

A. No. I wish I had of.

Q. Well now, on direct examination I will ask you whether you didn't give this answer: Mr. Wood was asking the question about this arrangement. "Well, the question was asked about this Mr. Sheldon and myself, after we had left Mr. Wells, was talking this over, I told Sheldon if he didn't get there, didn't get there Sunday morning, why I might take out the pickup myself and go up on the hill. But, I never had asked Mr. Wells about it, so he didn't know anything about that part of it. Sheldon didn't show up that morning, and I left there and went up on the hill for awhile and came back. I don't know whether Sheldon was there while I was gone or not, I didn't see him, but Sheldon was supposed to go up there and fix the whistle, I was going on a hunting trip if anything should show up around there, run into somebody I wasn't supposed to, I could have this excuse, I was up there helping to fix the whistle. Sheldon was the man that was supposed to fix the whistle himself, [81] but, as far as Sheldon himself going on a hunting trip I don't know whether he intended to go, to bring a gun himself, or not." You made

(Testimony of Charles M. Dake.)

that answer in the trial down at Astoria, didn't you?

A. I did, yes. I didn't want to get nobody else in no trouble that I was already in, all of my account over this damn hunting trip. I am getting tired of it and I want to tell the truth of it.

Q. I didn't bring in the hunting trip; they are bringing it in. But what I am asking you, isn't it a fact that Wells told Sheldon to fix that whistle on the yarder on that Snuday morning?

A. I think I have answered that once. I think I told you that I don't know for sure whether he did or not. He didn't tell me every time he gives an order.

Q. I will ask you, isn't it a fact that he told you in your presence while three of you were in the car?

A. Well, I know there was something mentioned about fixing the whistle. I know Sheldon and me was when we got up there. He and I didn't figure to take—didn't see it would take but a few minutes to do it and we would have that done. We didn't expect nothing for it. I didn't anyway. I was going up there to have a time.

The Court: Had you hunted with Sheldon before?

A. Yes.

The Court: Did he have a gun of his own?

A. Yes. [82]

The Court: Hunt with him several times before?

(Testimony of Charles M. Dake.)

A. Oh, I had hunted with him a couple of times.

The Court: Did he always bring his own gun?

A. Yes.

The Court: I suppose you expected him to bring his own gun this time?

A. Why, certainly.

The Court: What?

A. I sure did. I would have borrowed his gun if he hadn't.

Mr. Powers: Q. You what?

A. I said if he wasn't going hunting there wouldn't have been any use for me to go down there after Mr. Wells'.

Q. Well, let's see.

The Court: Before I forget it, I want to find out about the gas.

Mr. Powers: This would be a good time, then, your Honor.

The Court: Let's try to finish this up before noon.

Mr. Powers: You want to——

The Court: I want to know if he left Oregon City—of course, he couldn't have gone everywhere until the time of the accident without putting more gas in; he must have put more gas in some place after he left Oregon City Friday night. Remember about that?

A. I was waiting for the gun.

The Court: What did you do about the gas? [83]

A. Well, after I had went up on top of Round Top—not the top, but up there on the yarder hunt-

(Testimony of Charles M. Dake.)

ing, I drove it right on up to the yarder, and I thought, "By golly, I better check the gas, because there may not be enough gas to hunt and get back up here," so there wasn't a great deal in the tank and I filled it up. That pickup burned quite a bit of gas.

The Court: Where did you get that gas?

A. Down at Gaston there at the loading tank.

The Court: There was nobody else there?

A. No.

The Court: That was gas that belonged to the job?

A. Yes, it belonged on the job. That is what we always filled the tank up with.

The Court: Then what else did you do about gas?

A. I took a five-gallon can and filled that up with gas too and put it in the pickup, because I figured on doing quite a lot of hunting and I wanted to be sure there was enough gas to get back.

The Court: Did you put in any more gas before the accident other than that?

A. No.

The Court: And that carried you through?

A. I think that five-gallon can was still in the pickup at the time of the accident.

The Court: You don't think you had used that?

[84]

A. No.

Mr. Powers: Q. Did you have Mr. Wells' per-

(Testimony of Charles M. Dake.)

mission to take gasoline and put in the truck that day?

A. No; I figured on putting it in there. I didn't have no intention to go any place, just on that hunting trip when I was up on Round Top. I hadn't met the people yet.

Q. Well, you didn't have his permission to take the gas at any rate?

A. Why, I didn't—I had no actual permission to put it in there, no.

Q. Did you have Mr. Wells' permission to drive the pickup truck over to Tillamook and around to the beach and down Wolf Creek highway where this accident occurred? A. No.

Q. Now there are two roads, as I understand it, Mr. Dake; one is the Wilson Creek highway; is that right?

A. Wilson River and the Wolf Creek.

Q. Yes. Which road was the boarding house on where you stayed at Gales Creek?

A. Well, that there is the—I think you would call that on the Wilson River.

Q. Wilson Creek?

A. Wilson River. You could call it either one. You wouldn't either now since the new road opened.

Q. It is the Wilson River there, isn't it? [85]

A. Wilson River.

Q. And then going to work from where Haskins live you would go on the Wilson River Road?

A. Yes.

(Testimony of Charles M. Dake.)

Q. And then to come to your job up where the logging was going on, where would you go from the Haskins' place?

A. Well, about—oh, twelve miles or so on up the Wilson River highway to where our logging road took off.

Q. Would that be toward the coast?

A. Yes.

Q. And you were going along——

The Court: Pardon me. The logging road turned off on the right or the left?

A. To the right.

Q. And you were going along that road when you met the people on that road that you picked up?

A. I picked them up just shortly after—about a mile and a half from Gales Creek.

Q. About a mile and a half from Gales Creek. Were you on the Wilson River road then?

A. Yes.

Q. How many persons did you pick up?

A. Three.

Q. And what were they, men or women?

A. Two women and a man. [86]

Q. Did you have something to drink on that trip then? A. Yes.

Q. Had you had anything to drink before you picked them up?

A. Not since I got up that morning.

Q. Then when did you first start drinking after you picked them up?

(Testimony of Charles M. Dake.)

A. Oh, later on down the road a ways.

Q. Well, did you stop?

The Court: You didn't have anything along with you?

A. No, not right at the time; but I got some.

The Court: You hadn't had any during the day?

A. No.

The Court: Nor in the car?

A. None in the car.

Mr. Powers: Q. Where did you get some?

A. Got some at Tillamook myself.

Q. But did you have something to drink before you got to Tillamook? A. Yes.

Q. Where did you first stop for a drink?

A. Well, we had pulled off up—oh, just about—right close to the Consolidated—what is the name of the mill up there; that Consolidated mill we used to always call it. We pulled off the road there in a little park and had three or four drinks there.

[87]

The Court: They had it with them?

A. Yes.

The Court: They had it with them?

A. Yes. And then that is what decided me to go on to Tillamook. I kind of liked the looks of that girl that was in there.

Q. You had three or four drinks there and you liked her looks so you went on to Tillamook. That was what time, when you started out there from Gales Creek?

(Testimony of Charles M. Dake.)

A. About eleven in the morning, as near as I can judge.

Q. And you picked the passengers up about the same time then a mile and a half away?

A. It would be either five or ten minutes.

The Court: You hadn't come to your turnout?

A. Oh, no; quite a long ways from it.

Q. When you met them and——

The Court: No; when you stopped to have your drinks you hadn't come to your road?

A. No; about six, eight miles before we got to it.

Q. You stated that you had your drinks there and you decided then you would go on to Tillamook; is that right? A. Yes.

Q. And that was about a distance of forty miles?

A. Well, it wasn't quite forty miles from there, or a little farther.

Q. Possibly farther. And then what time did you get to Tillamook? [88]

A. Well, I don't know just for sure when it was I got down to my uncle's place; they got through eating dinner but hadn't cleared up the table yet.

Q. You mean their noon meal? A. Yes.

Q. Then you stayed there for awhile?

A. Oh, yes, quite a while.

Q. And you had some drinks there, as I understand it? A. I had a few.

Q. Then from there you decided to go over to the beach somewhere, I believe?

(Testimony of Charles M. Dake.)

A. Yes; we wanted to go over to the beach. I didn't want to drive back along the other way so I said we would take the Wolf Creek back. Well, if I had went to the beach from there and come back on the Wilson River I would have been just going the opposite direction. I wanted to get to the beach. If I would drive up the Wolf Creek I would still be on the road home and I would hit the beach.

Q. So you went over to the beach from Tillamook? A. I went up on the Wolf Creek.

Q. Yes; but I mean you left Tillamook and went to the beach some place. That was the next stop? A. Yes.

Q. How far from Tillamook to the beach?

A. Oh, I don't know just how far it is to Twin Rocks. [89]

Q. Approximately?

A. That is hard for me to say.

Q. What?

A. That is hard for me to say. I have been over that road hundreds of times, I guess.

Q. Forty miles? A. Oh, no.

Q. Ten miles?

A. Might be seven miles, eight miles, somewhere around there. I don't think it would be much farther than that.

Q. Seven, eight miles. What time did you get there? In the afternoon? A. Yes.

Q. Then did you go down on the beach?

A. Towards evening.

(Testimony of Charles M. Dake.)

Q. Did you go down on the beach then?

A. Yes.

Q. And you stayed on the beach about how long?

A. Oh, I don't know; it was after dark.

Q. Several hours?

A. Quite a while, yes.

Q. And did you have something to drink down there? A. Yes.

Q. And then you came back. After you left the beach what time did you start back to Gales Creek?

A. Well, I don't think it was—it must have been around 9 [90] o'clock anyhow, somewhere around there.

Q. And then you were coming back on the Wolf Creek highway from the beach when this accident occurred? A. Yes.

Q. That is an entirely different highway from the Wilson River highway?

A. That is right.

Q. And where would that bring you out then? You would have to come down to get on the Wilson River highway some place to get to Gales Creek.

A. Come through Timber on the old highway.

Q. Come into Timber on the Wolf Creek. How far is Timber from Gales Creek?

A. Oh, must be 28 miles, something like that.

Q. How far? A. Around 28 miles.

Q. It would be 28 miles from Timber back to Gales Creek?

A. From Gales Creek to—Timber to Gales Creek?

(Testimony of Charles M. Dake.)

Q. Yes. How far would you say it is from the beach where you stopped down to Timber?

A. Oh.

Q. Over the Wolf Creek, the way you came.

A. I don't know. Let's see, maybe sixty miles. It is pretty hard for me to figure.

The Court: I am surprised you had enough gas. What gas [91] mileage did you get on that car?

A. Gosh, I don't know. I never put any more in it.

Q. That would be about 136 miles that you traveled from the time you left Gales Creek until you were—if you got back there on the way you were traveling. I believe that is all.

Redirect Examination

By Mr. Miller:

Q. Do you know how much that tank holds?

A. No, I don't.

Q. By the way, this pickup is just a small pickup truck in the nature of a commercial truck like one of these grocery trucks?

A. It is a ton or ton and a half, three-quarter—darn if I know. I think it is a ton.

Q. Was there any restriction on where you could hunt? A. No.

Q. You may hunt any place?

A. No; there never was any restriction on me where I could hunt.

Q. Just go hunting?

(Testimony of Charles M. Dake.)

A. I started out hunting. I was going where the camp was at.

The Court: Had you used Mr. Wells' gun to hunt before?

A. Yes.

Q. When you were up at the first camp that is the only gun you did use, wasn't it?

A. Left it in the camp all the time; kept it in the bunkhouse.

Q. Did you have a gun of your own? [92]

A. No.

Q. You went hunting several times, did you, always using Mr. Wells' gun?

A. If he wasn't going to use it I would take it. If he said he was going to use it I would get another one.

Q. There were shells for the gun in the truck, were there?

A. Yes. I had some shells that had been in the truck ever since last hunting season.

Q. At Tillamook did you inquire for Mike Louis? A. Yes.

Q. And you were looking for him——

Mr. Powers: Well now, this is opening up a new subject. If you want to extend it, but I thought you weren't going to pursue this from your statement here, that that matter was *res judicata*.

Mr. Miller: If I am wrong I will withdraw it. I thought you had brought it out.

Mr. Powers: I didn't ask him about it. I only went into a subject that you opened up.

(Testimony of Charles M. Dake.)

Mr. Miller: Q. When you started back from Tillamook to Gales Creek, was it dark or not?

A. What is that?

Q. Was it dark? A. When?

Q. When you started back from the beach to Gales Creek. [93]

A. Oh. It was getting dark when I left the beach.

The Court: He told me he inquired from somebody over there and found he was working in the shipyards. Is that the man Wells talked about?

Mr. Miller: Yes.

Q. Now where did the accident happen, how far from Gales Creek?

A. Well, it must be thirty miles, I guess, something like that.

Q. Where does the Wolf Creek highway that you were returning on—does it join with the Wilson River highway?

A. Well, where the Wolf Creek highway—you leave the Wolf Creek highway just before you get into Timber and you take the old road across and it comes out—comes into the Wilson River highway about twelve miles, I guess, from Gales Creek. It is the old original highway through that country to Seaside.

Q. Did Wells ask you to look out for *me*, to see if you could find one?

Mr. Powers: We are going to object to all this, your Honor. That certainly is *res judicata*, that matter.

(Testimony of Charles M. Dake.)

The Court: It is one of the points of the case. Let me ask something.

Mr. Powers: May I ask this—we will have an exception to it, if the Court please. May we have an exception to it and we can get along faster?

The Court: Yes, certainly.

Mr. Miller: Q. Wells asked you to look out for men? [94]

A. Yes. He told every man that worked for him he was looking for good men, not only me but every other man. He said, "If you see a good man," why, he said, "I want him."

The Court: Of course you have a question of causation here, gentlemen. When he got fired up with whatever he was drinking, why, he got some different ideas in his head—I suppose you will argue all that; but I can see the—what is it you call these automobile cases—intervening cause that breaks the chain of causation. So you have the intervening cause of alcohol. As far as his intention was concerned his story is very plain: He was going back to get himself some more meat. But he met the ladies and the gentlemen and he had three drinks, I think he said, and then he got some other ideas. Not an uncommon occurrence. It wasn't his original plan at all; he said so.

Mr. Miller: Q. And the man you were looking for was Mike Louis?

A. That is the fellow I intended to bring over. I knew he wouldn't be a rigging slinger, but I

(Testimony of Charles M. Dake.)

could use him over there as a second loader if he would go out in the woods.

Q. He was your cousin?

A. Yes. That would be if Mr. Wells would hire him after I had found out whether he was there or not.

Q. Pardon me?

A. I said I didn't know whether Mr. Wells would hire him after [95] I had found him, whether he was there or not.

Q. He was the man you had in mind?

A. I had him in mind. I was going to either bring him over or have him call Mr. Wells.

Q. When you got down to the turnout your first intention, as his Honor suggested, was to get back up in the woods to Round Top to do your hunting?

A. I had intended to.

Q. Did you intend to continue that hunting over toward Tillamook?

A. I knew there was another place down the road a ways, there was an old logging road went in; I would go on down there if I couldn't find any on Round Top.

Q. You had seen deer all up and down that road to the coast before?

A. Oh, yes, hundreds of them.

Q. Where was this other place you speak of now?

A. I don't know the name of the place. It is a little logging road goes in just over the summit some place.

(Testimony of Charles M. Dake.)

Q. How far from Gales Creek?

A. Oh, I suppose 20 miles, 25 miles.

Q. 20 or 25 miles? A. Yes.

Q. Had you ever driven the truck to Tillamook before? A. Yes.

Q. This same truck? [96] A. Yes.

Q. On what occasion was that?

A. Well, I drove it over there for—Paulson Taylor borrowed the pickup to go after some parts for the truck; and when he got the truck together, when he got the truck put back together and he got back to Forest Grove it was too late to catch bass. Well, he said, “Mr. Wells told me if I was late I could have permission to use it.” Now I don’t know whether Mr. Wells give him that permission or not. He told me he did.

Q. But you drove over to Tillamook anyway?

A. So I drove the pickup for him.

Q. Did you tell Wells when you came back?

A. No, I didn’t say anything. It wasn’t none of my affair. I supposed he had loaned it to him.

Mr. Powers: We object to that and move the answer be stricken. It is hearsay and certainly is not binding on this plaintiff.

The Court: Wait a minute. It may remain subject to the objection.

Mr. Miller: Q. Ever drive the truck to Portland?

A. Yes.

Q. More than one occasion?

(Testimony of Charles M. Dake.)

A. Once, I think, was all. I don't remember of doing any other haul.

Q. Was Wells with you at that time? [97]

A. No.

Q. By yourself?

A. No. My wife and I started to make up and I come down and got some household gas and brought that back up.

The Court: We have heard about that already.

Q. Did Mr. Wells know about that trip; did you ask him?

A. I asked him for it, told him what the reason was for, and he told me I might use that if I would be careful.

Q. Did you introduce Mr. Wells to some of the union executives here in town? A. Yes.

Q. That was here in town? A. Yes.

Q. How did you get into town on that occasion?

A. I don't think that—we were broke down. Mr. Wells and I come in after some parts.

Q. Came in on the truck?

A. I think it was.

Q. The purpose of that was to establish relation with the union people so you could get men to work; is that correct?

A. Yes, if they had them. I didn't say we could get them.

Q. Have you used the truck to hunt many, many occasions?

Mr. Powers: He has been all over this, your

(Testimony of Charles M. Dake.)

Honor. I deliberately shortened my cross examination up. He specifically proved this, that he went hunting the same year before this. [98]

Mr. Miller: That is all, your Honor.

Mr. Powers: No questions.

The Court: That is all.

(Witness excused.) [99]

MRS. J. J. ADKINS

was thereupon produced as a witness in behalf of the defendants, and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Miller:

Q. Mrs. Adkins, you operate the telephone office at Gales Creek? Q. Yes, sir.

Q. And likewise you board some of the men there who work for Mr. Wells? A. I do.

Q. Charles M. Dake board with you?

A. Yes; when they work he does.

Q. Has he boarded with you recently?

A. Well, the month before the work shut down after this storm; he was with us before about a month.

Q. The past month he has been boarding with you? A. Uh huh.

Q. Did he board with you during the month of June, 1942, last June? A. Yes, sir.

Q. And for how long prior to that?

(Testimony of Mrs. J. J. Adkins.)

A. Well, he came to our home in January.

Q. Of 1942? A. Yes, sir.

Q. And he was there then until the end of June, 1942? [103]

A. Yes; he was there until the accident.

Q. Was there a red International pickup truck that was used by the men who were boarding there?

A. You say, Was there one?

Q. Yes. A. Yes, sir.

Q. Was that stored at your place?

A. Well, no, not very much of the time. It never was at my home at all until at the middle of May, and from then on. That is, I mean when it was left there, from then on until the day this accident occurred.

Q. It was stored in your yard at Gales Creek?

A. In the evenings when they would come home from work and stayed there until they went back the next morning.

Q. Now on the week ends during that period from May, you say, until the end of June, was that truck stored there at your place?

A. Week ends, you say?

Q. Yes.

A. Just roughly three or four times, two or three times; I don't know just exactly.

Q. Well, was it there most of the week ends or was it gone?

A. No. Most of the week ends—I don't think it was there over two or three times at the outside.

(Testimony of Mrs. J. J. Adkins.)

I know it wasn't over four times; maybe only three, because I didn't keep books on the truck.

[104]

Q. Well, did you know to what use it was being put during that time?

A. Just for the job, to take the men back and forth to their work.

Q. Well, I mean on the week ends.

A. Well, while it was left there it was left there; when it wasn't left there I don't know where it would be.

Q. You don't know where it was on the Saturdays and Sundays? A. No.

Q. You are the telephone operator at Gales Creek; you said that? A. Yes, sir.

Q. Do you recall putting in a call from Mr. Dake——

A. No, I didn't handle——

Q. On the Sunday of the accident?

A. No, I didn't handle any call for Mr. Dake.

Mr. Miller: That is all, your Honor.

Cross Examination

By Mr. Powers:

Q. Well, let me ask you just a question or two. You say the truck was left there and was used for the job of getting the men back and forth?

A. Yes, sir.

The Court: Is it your information, Mr. Miller, that there was a telephone call from Dake to Powell?

Mr. Miller: Yes, it is, your Honor. [105]

C. F. RICHARDSON

was thereupon called as a witness in behalf of the defendants, and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Miller:

Q. Give Mr. Michelet your name. [107]

A. C. F. Richardson.

Q. Your name is C. F. Richardson?

A. That is correct.

Q. You keep books for Mr. C. E. Powell?

A. I am a public auditor.

Q. Pardon me?

A. I am a public auditor.

Q. Public auditor.

A. And in that capacity I keep records for Mr. Powell, yes.

Q. Do those records include the time records and employment records and other such records in connection with the operation of a logging camp by Harold F. Wells?

A. May I call your attention to the fact that the Powell account and the Harold F. Wells account are entirely separate organizations. They have no inter-connections whatever.

Q. All right, sir; I didn't understand that. I am glad to have you tell me. They are two separate accounts.

A. Two separate organizations entirely.

Q. The Harold E. Wells account, then. You have such an account for Harold E. Wells?

A. That is right.

(Testimony of C. F. Richardson.)

Q. And as a public auditor you keep his records? A. That is right.

Q. Now in keeping those records you have employment records; you have records relating to the use of an International pickup [108] truck?

A. Not particularly, no, sir.

Q. In your records you have, of course, pay roll records? A. That is right.

Q. And one Charles M. Dake appears on that pay roll, does he? A. He does.

Q. And during the years 1941 and part of the year 1942.

A. Part of the year 1941 and part of the year 1942.

Q. And do you make out the checks?

A. I do.

Q. And do you ascertain the amount due each employee for each particular payday, how much he is to receive? A. That is right.

Q. I appreciate the fact that you do not set the amount of pay, but upon the basis of what Mr. Wells tells you, you figure up how much is due; is that it? A. That is right.

Q. And make proper deductions?

A. That is right.

Q. Now with reference to Charles M. Dake did you make deductions for gas used by Charles M. Dake? A. Yes, sir.

Q. Can you approximate how many times you may have made those deductions for gas?

A. Oh, maybe five or six times. I have never counted them. [109]

(Testimony of C. F. Richardson.)

Q. No. You say on five or six different occasions you made deductions for gas which was charged to Charles M. Dake?

A. That is right.

Q. Now where was that gas obtained, do you know?

A. Yes. It was obtained at the C. E. Powell pump at what we call Round Top Mountain. That is part of our operation.

Q. At the C. E. Powell pump at the Round Top operation? A. Yes, sir.

Q. Dake at that time was working for Wells?

A. That is right.

Q. And you have your ledger here, do you not?

A. Yes, sir.

Q. And it shows those gas deductions?

A. That is right.

Q. After you are excused from the stand would you be good enough to look in there and find how many occasions on which you charged gas to Dake and be good enough to return and tell us?

A. Yes, sir.

The Court: With the dates.

A. Yes, sir. I can give you the dates—I can give you the pay roll dates but not the date that the actual gas was taken.

The Court: That would be the following——

A. The following week, probably.

Mr. Powers: I think they all appear on this exhibit that Mr. Wells had this morning. I notice

(Testimony of C. F. Richardson.)

this on there; I think [110] they are all on there. I think that is a copy of the record.

(Discussion off the record.)

Mr. Miller: Q. You have your office at Milwaukee; is that correct?

A. That is correct, sir.

Q. Do you go out into the woods at the place of the operation? A. Not very often.

Q. You have been out there? A. Oh, yes.

Mr. Miller: I think that is all.

Cross Examination

By Mr. Powers:

Q. Mr. Richardson, I believe you are the Justice of the Peace out in Milwaukee, too, aren't you?

A. No. I was for a number of years but no longer. The people didn't want me after 1941.

Q. Well, there has been produced by Mr. Wells this morning two ledger sheets which you have certified that that is a correct copy of the books. The same information is on here about the gas, I believe, as in the books, isn't it?

A. Well, if I certify it is the same.

Mr. Powers: With the permission of the Court I will approach the witness.

Q. I see some items there stating "Gas." Is that—

A. That is right. I never made this. [111]

Q. Well, will you look and see what the last date is that any charge for gas was made against Dake? A. According to these sheets?

(Testimony of C. F. Richardson.)

Q. According to your records. If you have any other records here, if it is not all on here, any record that you have that will give the last charge made against Dake for gasoline.

(Witness leaves stand to consult records.)

The Court: Well, put on another witness while he is going over that.

(Witness excused.) [112]

ALBERT F. NELSON

was thereupon called as a witness in behalf of the defendants, and, being first duly sworn, testified as follows:

The Clerk: Will you state your full name, please.

The Witness: Albert F. Nelson.

Direct Examination

By Mr. Miller:

Q. Your name is Albert F. Nelson?

A. That is right.

Q. Where do you reside? A. Beg pardon?

Q. Where do you live? A. Tillamook.

[116]

Q. Are you related to Charles M. Dake?

A. I am, through marriage; I am an uncle by marriage. Otherwise—in other words, I married his aunt.

(Testimony of Albert F. Nelson.)

Q. On June 28, 1942, that was on a Sunday, June 28th last summer—— A. Yes.

Q. ——did you see Mr. Dake?

A. Yes, sir.

Q. Where?

A. He came to my place somewheres between twelve and one o'clock on that date.

Q. And how did he get there, do you know?

A. Why, he came in a red pickup truck.

Q. Did you ever see that pickup truck before?

A. Yes, sir.

Q. Where?

A. Why, I can't—he was over to my place once before with it somewheres—a couple months before. Anyway I couldn't say just the exact date because it is nothing that I can fix the date by. However, I am under the impression he came on Saturday evening and left the next morning.

Q. The same truck?

A. I would say it was the same truck. It is identical in color and everything else, although I never paid any attention to the make of the truck or anything else. [117]

Q. Did Mr. Dake drive it to your place? Did you see him drive up?

A. Why, I didn't see him in that time, but he was the only one that was there that time. He came of an evening and just came into the house.

Q. Was he the one that drove it away?

A. He was the one that drove it away.

Q. On both occasions?

(Testimony of Albert F. Nelson.)

A. Both occasions.

Mr. Miller: I think that is all.

Mr. Powers: Move the testimony be stricken; it doesn't tend to prove or disprove anything in this case, your Honor.

The Court: It will remain subject to the objection.

(Witness excused.) [118]

C. F. RICHARDSON,

a witness in behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows: [119]

Redirect Examination

By Mr. Miller:

Q. Did you ascertain the number of times you made charges for gas to Mr. Dake?

A. Number of times?

Q. Yes.

A. I can tell you in just one second.

Q. All right, sir. [121]

A. Pretty good guess. Just six times.

Q. Six times.

The Court: And the dates, nearest dates?

Mr. Miller: Probably the amount, too, if that shows, your Honor.

A. All right; we will give them to you as they appear on this copy of the ledger sheet.

The Court: The date and the amount.

(Testimony of C. F. Richardson.)

A. August 8, 1941, \$2.20; August 22, 1941, \$1.20; September 3, 1941, \$1.80; September 19, 1941, \$1.60; October 16, 1941, \$2.25; and November 14, 1941, \$1.80.

Q. And subsequent to November 14th, or around that time, the gas pump was no longer in use; is that correct?

A. We changed around the complete operations along about that time.

Q. And you had no gas pump over at the other side? A. No.

Q. Were you out there on week ends?

A. I am sometimes; not very often.

Q. Not very often? A. No, sir.

Q. When you were out there did you have occasion to see the truck?

A. Yes, I have seen the truck out there.

Q. On week ends? A. Yes. [122]

Q. Where?

A. Oh, right by the cookhouse.

Q. That is on the old operation?

A. That is up at Round Top.

Q. Yes. And then since they have been on the other side?

A. Since they have been on the other side I don't think I have been out there.

Q. I see. You have no way of actually knowing what use was actually made of the truck?

A. I don't have.

(Testimony of C. F. Richardson.)

Q. Subsequent to the time they moved to the second site? A. I do not, sir.

Mr. Miller: That is all.

Mr. Powers: That is all.

(Witness excused.) [123]

HAROLD EDWARD WELLS

was called in rebuttal as a witness in behalf of the plaintiff, and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Powers:

Q. You know where Mr. Sheldon is now? Do you know of any efforts that have been made this week to try to get him?

A. You tried to get him.

Q. And where did you tell me to try to get him?

[124]

A. At his house, Forest Grove.

Q. Do you know whether I have been able to reach him by telephone?

Mr. Miller: Mr. Powers, will you state what the facts are. I will stipulate.

Mr. Powers: I tried all this week since Monday to reach him by 'phone, and this morning again I left word at the office, and this afternoon when I was on my way here to court, if he could be reached to have him call me in court.

(Testimony of Harold Edward Wells.)

Q. Do you know where he might be then, since he is not there?

A. He has got a truck of his own working on a Government project over in Eastern Oregon, and possibly he may be over there while we aren't working. I don't know. It could be possible. How to get hold of him——

Q. He testified in the State court down at Astoria?

A. Yes.

Q. And he testified on behalf—who called him down there? Was he called for you, testify for you?

A. No.

Q. The other side called him?

A. I think they did. I am quite sure.

Q. At any rate, he was down there to testify in the case there?

A. Yes.

Q. It appears from the record there he testified as the defendants' witness. Were you there when he testified?

A. No, I wasn't. They let me testify one day and go back and [125] run the outfit while he went down and testified the next day, so we wouldn't have to shut our operation down.

Q. I see. Now you heard the testimony here by Mr. Dake that he had used this truck to go hunting with on several occasions when you were over on the first job on the other side of the mountain, as I understand it. What is the fact about that?

A. Any time that he used it over there, we was up in the woods on a private road all the time.

(Testimony of Harold Edward Wells.)

Q. Did he ever use it when you were there without you giving him permission?

A. No, he never did; not that I know of. He wasn't in the habit of taking it that way. This trip over to Tillamook was the first time I ever knew of him taking it that I didn't know of.

Q. You never knew he had taken the truck away from the job before?

A. No; I didn't know he had ever been over to Tillamook the second time with it, which this gentleman there stated a while ago?

Q. Mr. Nelson? A. Yes.

Q. Did you ever give him permission to take the truck over to Nelson's house at all?

A. No; absolutely not.

Q. And he testified that he had taken the truck down to Timber one time to buy some beer. Did you ever know about that?

A. No, I didn't. [126]

Q. Did you ever give him permission to?

A. No; absolutely not.

Q. And he testified that he took it on about two times before to go fishing a mile or two from Gales Creek. That was some time before this accident. Did you ever know about that?

A. No, I didn't know it.

Q. Did you give him any permission to?

A. No. I would have put a stop to it if I had knew it.

Q. Now he testified that you told him when you

(Testimony of Harold Edward Wells.)

took him home to take the truck back to Gales Creek; is that correct? A. Yes.

Q. And he testified that at least it was his understanding that either he or Sheldon could drive the truck up to go hunting. Did you give them any such understanding? A. No, I did not.

Q. What was it that you understood?

A. The understanding was Sheldon was going up in the woods and repair this horn on the yarder. Dake was going to go with him and do a little hunting. Sheldon testified to that, too, at Astoria.

Q. Well now, when——

The Court: That last comment may be sticken.

Q. When you stopped your work on the first job in 1941, that is where he said he had been hunting, did he do any hunting over on the other job, up until this occasion, that you knew of?

A. I don't think so. [127]

Q. Did he ever use the truck that you knew of to hunt on this—— A. No.

Q. It was always——

A. Too far, too far from the woods. Over on the other side we was living right in the woods in the camp.

Q. And he testified that he had bought gasoline on one or two occasions to put in the truck and other times to put in a car that he went fifty-fifty with.

A. Yes.

Q. Is that about right?

A. Yes. He and a fellow that was pulling rig-

(Testimony of Harold Edward Wells.)

ging for me was together and they run around lots in his car.

Q. Did you ever, up to the time of this accident, let anybody drive that truck on any pleasure trip like this trip that Dake described?

A. No, I didn't.

Q. Did you ever give him any permission to do that? A. No.

Q. Now Dake testified that any deer meat that he got there would be divided among the men at the camp, and that would include you. Did you have any, or hear any, understanding from him that he would give you any deer meat? A. No.

Q. How was it that he happened to use your gun?

A. I loaned him my gun lots of times; loaned it to any of the [128] boys working for me that wanted it.

Q. He just didn't have a gun, is that it?

A. That is it. I kept my gun over on Round Top all during hunting season. There was several of the boys used it.

Mr. Powers: I believe that is all.

Mr. Miller: No questions.

The Court: Step down.

(Witness excused.)

[Endorsed]: Filed Sept. 24, 1943. [129]

PLAINTIFF'S EXHIBIT NO. 12

TRANSCRIPT OF TESTIMONY

(During the opening statement of the plaintiff's attorney, Mr. Wood, the following record was made):

Mr. Wood: The stipulation this morning, I think was unintentionally not broad enough on the part of either of us. Will you stipulate, Mr. Norblad, with me that at the time of this accident the negligence of Dake as alleged in the complaint was the proximate cause of the death of Emmett C. Jasper, deceased?

Mr. Norblad: Yes, so far as the negligence of Dake alone was concerned.

Mr. Wood: As far as Wells is concerned, reserving, of course, your position that Dake was not, at the time of the accident—reserving any other defense you may have, are you willing to stipulate that the plaintiff need not produce any evidence here that the negligence of Dake was the proximate cause of the death of the decedent, as far as Wells is concerned?

Mr. Norblad: Yes, reserving all questions of agency, master and servant, and so forth. [2-a*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

Plaintiff's Exhibit No. 12—(Continued)

TESTIMONY OF HAROLD EDWARD WELLS

A. (Continuing) I had been having some trouble with my signal horns on the yarder that day.

Q. Where was the yarder? [29]

A. Right where we were logging there on Round-top Mountain, so we left the woods——

Q. (Interrupting) Who is "we"?

A. Well, the whole crew and myself.

Q. All right.

A. We agreed that Sheldon——

Q. (Interrupting) *What* is Corwin Sheldon?

A. Yes, he was going back to the woods the next day with the pick-up.

Q. On Saturday? A. On Sunday.

Q. That is on Friday I am referring to, you mean the second day following this time?

A. Yes, he was going to repair these horns on the yarder for me.

Q. Who was going to do that? A. Sheldon.

Q. Anybody else?

A. Charley Dake was going to go with him.

Q. What was he going with him for?

A. Well, for a little hunt.

Q. Personal matter entirely? A. Yes.

Q. Had nothing to do with the logging operation or the labor or any of this equipment? A. No.

Q. Well, was this the result of the conversation?

A. Yes. [30]

Q. Where did that conversation occur?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

A. In the seat of the pick-up as we were leaving the woods. [31]

Q. He heard whatever was said about Corwin taking the car on the following Sunday?

A. Yes.

Q. —and going to do this work for you?

A. Yes.

Q. Well, what happened after that?

A. He came down and picked me up.

Q. You refer to Dake?

A. Yes; I got in the pick-up and went home, he took the pick-up back to Gales Creek and left it there that night; from then on this other trip started.

Q. Now, did he have any authority or permission from you to use the car on Sunday?

A. Absolutely no.

Q. Was he in your employ on Sunday, Sunday the 28th? A. He was not.

Q. Did he have anything to do in the line of your employ [33] with the use of that car on Sunday the 28th? A. He did not.

Q. Had you ever allowed your men the use of the car without your special permission?

A. No.

Q. And did Dake know that? A. Yes.

Q. Had Dake ever used the car before, before this time? A. Only when I told him to.

Q. And not otherwise?

A. No, absolutely not.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

Q. Upon what occasions had he used the car?

A. Well, work for me such as running errands for me in the woods to get this and that and the other.

Q. Had you ever allowed him to use the car over private roads down there?

A. Yes, I did last summer.

Q. That was by special permission, that was over private roads? A. Yes.

Q. Not on public highways?

A. Never left up there with it at all.

Q. What was the purpose of those trips?

A. Hunting.

Q. That was used last summer?

A. Last summer.

Q. But since that time has he used the car for any occasion of that kind? [34] A. No.

Q. Well now, you know of this unfortunate accident that occurred on the 28th? A. Yes, sir.

Q. You know where it occurred? A. Yes.

Q. When did you first learn of that accident?

A. Ten o'clock the following Monday morning; I don't know exactly the date.

Q. Going back to the car, you say that he didn't have your permission or authority, express or implied in any way, shape or form, to use that car on the day of the accident? A. No.

Q. And it was to be used solely by Mr. Corwin, trip on his own private business? A. Yes. except that he was to go up with him on a hunting

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

Q. And Corwin was—or Sheldon was to drive the car? A. Yes.

Q. Had Mr. Dake ever taken your car or used it without your permission and knowledge, express or implied, before this time, on the 28th of June?

A. No, not that I know of.

Q. Did he have any right to use the car on Sunday, the 28th, referring to Dake? A. No.

[35]

Q. Now, on this Sunday morning Sheldon was to go up and repair this horn? A. Yes.

Q. And, of course, in repairing the horn he had permission, he or Dake, whichever one was to drive it, I don't suppose that made such difference to you, to get up and have that horn [49] fixed, they had a right to use the truck for that purpose?

A. Sheldon did.

Q. He had to fix the horn?

A. That is right.

Q. Of course, you knew *what* Dake was going to go, he told you? A. Yes.

Q. You gave him the gun?

A. I loaned him the gun.

Q. Was he going to work on the horn up there too?

A. Not that I know of; he might have went and helped him with it.

Q. But he at least had permission to ride up that far with Sheldon for the purpose of hunting?

A. Yes. [50]

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Harold Edward Wells.)

Re-cross Examination

By Mr. Wood:

Q. Mr. Wells, you were here this morning when Mr. Norblad made his opening statement, were you not? A. Yes.

Q. Did you hear him say that Dake, Charles Dake, practically stole the pick-up, that would be the evidence in this case?

A. I didn't hear him say that.

Q. You heard that statement? A. Yes.

Q. Do you want to go on record as subscribing to that same statement made by your attorney, that Charles M. Dake stole this pick-up?

A. I think so.

Q. At the time of the accident? A. Yes.

Mr. Wood: That is all.

(Witness excused.) [58]

CHARLES M. DAKE,

called as a witness on behalf of the defendant, and being sworn, testified as follows: [60]

A. He didn't tell me I could drive it at all that day, I didn't ask him for it. [62]

Q. Did you have any permission or authorization from him either impliedly or explicit in any way to use the car on Sunday the 28th? A. No.

Q. You drove it without his permission, without his authorization and without his knowledge, then?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

A. Yes.

Q. What time did you take the car?

A. I don't remember the exact time.

Q. Just about?

A. Well, I imagine it was after breakfast.

Q. Approximately what time?

A. Oh, around seven o'clock.

Q. About seven o'clock?

A. Yes, or eight, maybe.

Q. Where did you take the car?

A. I drove it up to where the logging road turned off, drove it up into the woods.

Q. Was that off the Wolf Creek highway?

A. Yes.

Q. How far off the Wolf Creek highway?

A. About six or seven miles, something like that.

Q. Did you go hunting? A. Yes.

Q. What did you do after that?

A. I came back to Gales Creek.

Q. What time was it then?

A. Well, I don't know what time it was. [63]

Q. Well, approximately?

A. It was in the forenoon, somewhere nine or ten o'clock, maybe around ten I imagine.

Q. What did you do after that?

A. Well, I stayed around there for awhile, then Mr. and Mrs. Adkins was going to have some people for lunch that day, extra, I had an early lunch, around 11 or 11:30, I got in the pick-up and drove it off straight for the Coast.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

Q. Over to the Coast, you mean over the Wolf Creek highway towards Tillamook? A. Yes.

Q. What were you going to Tillamook for?

A. Well, I was just going over there on a trip.

Q. Pleasure trip of your own? A. Yes.

Q. Did you have any purpose in going over there, any business relations with Mr. Wells or for Mr. Wells or for his business, in any way, shape or form whatsoever? A. No.

Q. Purely a pleasure trip of your own?

A. Yes, in a way it was.

Q. Well, was it in any other way?

A. No, well, I did think about a cousin of mine that he could go to work there if he wanted to, but I never said anything to Mr. Wells about it; I was going to tell Mr. Wells that he would go to work for him.

Q. Were you authorized to speak, did Mr. Wells ever [64] authorize you to speak to him?

A. He never knew of him.

Q. That was just in your own mind then?

A. Yes.

Q. You didn't go over there for that purpose?

A. No, not especially.

Q. Tell us what you did on that trip?

A. Well, going on, I rode up the highway a ways, I seen a man and two women walking along the highway.

Q. On the way to Tillamook?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

A. Yes. I stopped and asked them if they wanted to ride. They said "Yes". One of these girls got in the front seat with me and the man and this other woman got in the back of the pick-up. I asked her where they were going. She said they were going to Tillamook. I said I guessed I would go to Tillamook too. I went over to Tillamook with them. After we got to Tillamook I drove down to my Uncle's place, down there for awhile, then we started out. I said, "Well, I am going to go back over to Gales Creek; if you folks want to go with me we will go around the other way and come up through towards Seaside and across," so that is the way we came. We came up as far as Twin Rocks, we stopped there and drove down onto the beach and stayed there for awhile.

Q. Have something to drink?

A. Yes, we had a little bit. We gave a lot of time down on the beach, it must have been dark.

Q. Did you go to see your cousin?

A. Yes, he wasn't there. [65]

Q. Did you know these people that you picked up? A. Never seen them before.

Q. Did they drive back with you?

A. Yes, they came back with me.

Q. During all this time you were driving Mr. Wells' car, this pick-up, without any permission or authorization, and without his knowledge and consent, that is correct, isn't it? A. Yes.

Q. And he didn't know that you were going to

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

use, and he hadn't given you any permission to use the car on Sunday at all?

A. No, I never had asked him for it.

Q. Now, what is the fact, was he in the habit of allowing you to use the car without his permission?

A. No, I used it a time or two, but he didn't know it.

Q. You did it without his permission?

A. Without asking for it.

Q. He was very careful to not give to anybody the use of the car, was he not? A. Yes.

Q. And you, as well as the other employees, understood you couldn't drive that car at all without his permission or his special permission and authorization?

A. We knew we weren't supposed to.

Q. You knew you weren't supposed to use that car on Sunday or any other day without his express permission? A. Yes. [66]

Q. You didn't tell him you were going to Tillamook? A. No.

Q. He knew nothing about it?

Mr. Hesse: Your Honor, I object again, all of those questions are so leading.

The Court: Yes, they are quite leading.

Q. (By Mr. Norblad) Did he know anything about your going to Tillamook?

A. No.

Q. Did he know anything about this cousin of yours down there? A. No.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

Q. Had you ever discussed this cousin with him or the possibility of getting a job with him?

A. We never had.

Q. And then on the way back this wreck occurred? A. Right.

Q. This unfortunate wreck? Did you have any authority from Mr. Wells to hire anybody?

A. No.

Q. Were you ever given any permission or authority by Mr. Wells at any time to take this pick-up truck on business or pleasure of your own?

A. Not off of the woods road up there.

Q. What do you mean by that?

A. I have drove it down a half mile or so to where the gasoline is dumped off, pick up the gasoline over there and bring it back to the tanks. [67]

Q. That was in connection with his business?

A. Yes.

Q. But I am referring to the times when it wasn't in connection with his business, did he ever give you permission to drive the car excepting when it was on his own business?

A. Well, once or twice last year, last fall during hunting season.

Q. Was that permission to drive it over the public roads of this state or private roads?

A. Private.

Q. Did you ever ask him to use the truck to go on any business or affairs of your own?

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Charles M. Dake.)

A. No.

Q. Did you ever use it without his permission?

A. Yes.

Q. When? A. Well——

Q. (Interrupting) Or without his knowledge, both?

A. I used it several evenings after work, after supper down there, drove up the highway a mile or two to fish, and then on Saturday before this accident I drove it to Hillsboro to the dentist and had my teeth pulled.

Q. Did he know anything about your having trouble with your teeth? A. No.

Q. Did he authorize you to use the car?

A. No. [68]

Q. You did it without his permission and *with* his knowledge or without his consent?

A. Yes.

Q. Were those the only times—do you know whether he knew about your having used the car without his consent or permission?

A. Well, I don't think he did.

Q. As far as you know he didn't know?

A. That is right.

Q. Did you have any work to do in connection with Mr. Wells' business on Sunday the day of the accident, of any kind at all? A. No. [69]

Plaintiff's Exhibit No. 12—(Continued)

CORWIN SHELDON,

called as a witness on behalf of defendants, and being sworn testified as follows:

Direct Examination: [104]

Q. You don't know anything about that feature of it at all? A. No, I don't. [107]

Q. Now, then, between Glenwood and Gales Creek did you and Dake have any conversation about his hunting?

A. Oh, he said something about if a game warden came up there tell him he was supposed to be helping me, or something of the kind.

Q. He asked you that? A. Yes.

Q. Tell the jury as near as you can just what was said.

A. Well, he just said if anybody comes up there you tell them I am supposed to be helping.

Q. Did you respond to that?

A. No, I never said nothing to him.

Q. Was he to help you in any way?

A. No, he wasn't to help me at all.

Q. Did you make any arrangements as to any time when you were going to meet at Gales Creek?

A. I told him I would be down just as early as I could; I didn't get there until——

Q. (Interrupting) That was while Wells was there, the three of you were there?

A. No, Chuck asked me what time I would be going up, I told him I didn't know for sure, but just as soon as I could.

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Corwin Sheldon.)

Q. When you speak of "Chuck", you refer to Mr. Dake? A. Yes.

Q. You told him you would be down there just as soon as you could?

A. Just as early as I could.

Q. Did you go down there Sunday morning, the 28th? [108] A. Yes.

Q. What time did you get there?

A. Oh, it was pretty close to noon when I got down there.

Q. Was the pick-up truck there?

A. No, the pick-up was gone.

Q. Did you know who had taken the pick-up?

A. No, I never stopped, I just drove up there and the pick-up was gone, so I went on.

Q. When did you first learn that Mr. Dake had taken the pick-up?

A. Oh, it was about noon the following Monday, we were eating dinner.

Q. Do you know what Mr. Wells' rule was with reference to the use of that pick-up, whether anybody could use it without his permission, or not?

Mr. Wood: There is no rule pleaded, your Honor, no rule or custom pleaded.

Mr. Norblad: Don't have to plead customs under those circumstances, no necessity of pleading it.

The Court: I think I will let you answer.

(Whereupon the question was read by the Reporter.)

Plaintiff's Exhibit No. 12—(Continued)
(Testimony of Corwin Sheldon.)

A. As far as I know, as long as I worked for him nobody ever did use it unless he told them to, sent them to do something for him.

Q. Did the employees all understand that, did they discuss it among themselves?

A. Yes, they never used it. [109]

Q. Did you know that employees didn't use it without his permission?

A. As far as I know they never did, I know I never did.

Q. On this occasion when you three were together did Mr. Wells give Mr. Dake any permission to use the truck on Sunday?

Mr. Wood: As far as he knows.

Q. (Mr. Norblad) Well, in their conversation?

A. No, I never heard him say anything about it at all.

Q. It was evidently understood that you were to use the truck and drive it and nobody else was to have it?

A. That was the understanding, I was to take it, he told me to take it.

Q. —that nobody else was to take it?

A. No.

Q. By the way, there was no camp up at the operations where you were? A. No. [110]

[Endorsed]: Filed Oct. 14, 1943. Paul P. O'Brien, Clerk.

EXHIBIT "D"

In the Circuit Court of the State of Oregon
For Clatsop County

EDWARD J. JASPER, etc., et al,

Plaintiff,

vs.

HAROLD E. WELLS and CHARLES M. DAKE,
Defendants.

SPECIAL FINDINGS

We, the Jury in the above entitled cause, make answer to the following requested special findings as follows:

1. Was defendant Dake at the time of the collision driving said pick-up delivery truck as the agent, servant or employee of defendant Wells in pursuance of Wells' business? Yes.

2. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck either with the express or with the implied permission or consent of defendant Wells on defendant Dake's own business? No.

3. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck entirely without the permission or consent of defendant Wells and entirely on defendant Dake's own business? No.

HAROLD W. BELL

Foreman

[Endorsed]: Filed Oct. 14, 1943. Paul P.
O'Brien, Clerk.

[Endorsed]: No. 10580. United States Circuit Court of Appeals for the Ninth Circuit. Hartford Accident and Indemnity Company, a corporation, Appellant, vs. Edward J. Jasper, Administrator of the Estate of Emmett C. Jasper, deceased, Albert Brown and Charles M. Dake, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the District of Oregon.

Filed October 14, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10580

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Appellant,

vs.

EDWARD J. JASPER, Administrator of the Es-
tate of Emmett C. Jasper, deceased; ALBERT
BROWN; and CHARLES M. DAKE;

Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL

1. The Court erred in failing to find in favor of plaintiff and enter declaratory judgment accordingly;

2. The Court erred in failing to find that Dake was on a personal mission of his own at time of accident and that his "actual use" of the truck was without permission of the named insured;

3. There is no competent substantial evidence to support the finding and conclusion of law based thereon that the "actual use" of the truck by Dake at the time of the accident was with permission of the named insured;

4. The Court erred in failing to construe the provisions of the policy of insurance and particularly the meaning of the words "actual use" con-

tained in the omnibus provision thereof relating to additional insureds under paragraph 3 of insuring agreements headed "Definition of Insured";

5. The Court erred in failing to make a special finding of fact as to whether Dake's assumed permission to use the truck was an implied permission or an express permission and in failing to state a separate conclusion of law based on either one or the other of such findings of fact as required by Rule 52 of Federal Rules of Civil Procedure;

6. The Court erred in failing to make a finding as to whether the original taking of the truck on the day of the accident was with permission of the named insured and whether the truck was being used at the time of the accident for the same purpose it was taken and if not being used for the same purpose, whether there was a slight or substantial deviation therefrom and in the absence of such findings there is no basis for the legal conclusions entered and no way of telling what legal principle the judgment entered is based upon.

7. The Court erred in its finding and conclusion of law that the same matter was not adjudicated in the State action as to defendant Edward J. Jasper, Adm. of the Estate of Emmett C. Jasper, deceased;

8. There is no competent evidence to support the finding that Dake was using the insured truck at the time of the accident with permission of the

named insured so as to constitute Dake an additional insured under the provisions of the policy.

Submitted by,

JAMES ARTHUR POWERS

Attorney for Appellant

Due service of the foregoing, Appellant's Statement by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 15th day of October, 1943 hereby is accepted.

ROBERT S. MILLER

Of Attorneys for Appellees

[Endorsed]: Filed Oct. 18, 1943. Paul P. O'Brien, Clerk.

7
No. 10580

In the United States
Circuit Court of Appeals
For the Ninth Circuit

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
vs. *Appellant,*

EDWARD J. JASPER, Administrator of the Estate of Emmett C.
Jasper, deceased; ALBERT BROWN and CHARLES M. DAKE,
Appellees.

Brief of Appellant

Appeal from the District Court of the United States
for the District of Oregon

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No. 10580

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Appellant,

vs.

EDWARD J. JASPER, Administrator of the Estate of Emmett C. Jasper,
deceased; ALBERT BROWN and CHARLES M. DAKE,
Appellees.

Brief of Appellant

Appeal from the District Court of the United States
for the District of Oregon

JURISDICTIONAL STATEMENT

It is believed this Court on appeal has jurisdiction for the reason the appeal is from a final judgment entered in the District Court (28 U.S.C.A., Sec. 225). The District Court acquired jurisdiction through service of summons and complaint upon all defendants herein after the filing thereof by appellant seeking a

declaratory judgment (Sec. 28, U.S.C.A., Sec. 400) and alleging facts showing the existence of an actual controversy between the parties (28 U.S.C.A., 71), and showing the further fact that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00). It is an admitted fact that at the time of the commencement of the within action plaintiff was a resident and citizen of the State of Connecticut (T. 2, 8), and that all defendants were residents and citizens of the State of Oregon (T. 2, 8).

STATEMENT OF CASE

This is an action for declaratory judgment. Plaintiff is an insurance company. It issued to one Harold E. Wells a policy of automobile liability insurance. The policy contains what is generally known as an "omnibus" provision (T. 64). This provision extends insurance coverage, in addition to the named insured, to any person while using the automobile "provided the actual use of the automobile is with the permission of the named insured." The controversy here is whether the "actual use" of the pick-up truck owned by the insured Wells and being driven by Charles M. Dake when an accident occurred, was with the permission of Wells. On Sunday night, June 28, 1942, at about 11:00 o'clock, Dake, while driving the Wells

truck, was involved in a collision on the Wolf Creek Highway, some 35 miles west of Forest Grove, Oregon. The collision resulted in the death of Emmett C. Jasper. One of the appellees here is the Administrator of his estate. There were several others in the Jasper car who were allegedly injured. All these persons asserted claims against Wells as the owner of said truck and against the plaintiff here as the insurance carrier for Wells, whereupon plaintiff filed its complaint asking the court below for a declaratory judgment seeking to establish the fact that the "actual use" of the truck by Dake at the time of the accident was not with permission of the named insured. The evidence shows that Wells is engaged in logging operations, operating with a crew of seven or eight men, in a sparsely settled area. Roughly speaking, the place is located between Portland and the Coast, slightly more than half-way from Portland to the Coast. There is one road out of Portland to the Coast known as the Wolf Creek Highway. This road leads toward Seaside, Oregon. There is a road known as the Wilson River Highway, which makes a junction with the Wolf Creek Highway near the town of Timber. About 12 miles southeast of Timber on the Wilson River Highway is the town of Gales Creek. Six miles west of Gales Creek is a place called Glenwood. To the

west of Glenwood, on the Wilson River Highway a distance of six miles, there is a logging road which leads up on Round Top Mountain. Three miles up this logging road is the site of Wells' logging operations. The pick-up truck was used in the logging operations up in the mountains. It had wheels which are several inches higher than ordinary wheels and this facilitated traveling in the rough area. It was not practicable to use an ordinary automobile around the operations. There was no cookhouse or bunkhouse at the logging operations. Wells stayed at the town of Glenwood, most of the other members of his crew stayed at the town of Gales Creek, where they boarded with a family by the name of Adkins. The truck was used to transport the crew to their place of work in the morning and to carry them to Gales Creek in the evening. The usual practice was for Wells to drive the truck in the evening from the site of the operations to Glenwood. He would get out there and some other member of the crew would drive the car to Gales Creek, where it was parked for the night at the Adkins home. In the morning, some member of the crew would drive the car from Gales Creek to Glenwood and Wells would drive it from there to the site of the operations. Wells had a well known rule that no one could use the truck without his permission and

the evidence discloses that Wells at no time ever permitted any member of his crew to use the truck for any personal pleasure trip.

The crew, in their logging operations, worked five days a week, from Monday morning until Friday evening. They did not work on Saturday or Sunday. Dake, on Sunday, June 28, 1942, took the truck, without permission from Wells, started west from Gales Creek on the Wilson River Highway, proceeded a distance of a mile and a half or so and picked up three hitch-hikers, two women and one man. They drove a few miles and stopped and had three or four drinks of liquor, which was furnished by the hitch-hikers. The hitch-hikers were on their way to Tillamook, a distance of some forty miles. Dake said that he "took a shine" to one of the women and decided to drive them to Tillamook. Dake got more liquor at Tillamook and they drove out in the country to a farm to see Dakes uncle. After more drinking there they drove on to the ocean beach, stopping at a place called Twin Rocks. They spent a considerable period of time there on the beach and indulging in more drinking. It was after dark, some time after 9:00 o'clock, when the party left the beach, starting for the town of Timber over the Wolf Creek Highway. They traveled a distance of forty miles or so from their last stop when

the accident occurred. One woman was riding in the driver's cab with Dake and the other man and woman were riding in back in the bed of the truck. Wells did not learn of the accident until nearly noon on the following day. Wells considered the truck as stolen. Wells did not see Dake after the accident; Dake had been arrested and as a result of the accident and death of Jasper was sentenced to a year in the state penitentiary. Wells learned of developments by way of a laconic communication received through the mails from Dake shortly after the accident. (Ex. I, T. 63). From this it was apparent that it was going to be claimed that Wells' insurance policy extended coverage to Dake. The matter was reported by Wells to appellant as his insurance carrier, that Dake without consent from Wells had taken the truck on a personal trip to the Coast and became involved in an accident (T.48). Dake in an apparent effort to exculpate himself told different stories regarding the purpose for which he had taken the truck. These contradictions form one of the bases of a motion to the court below to consider the further point of whether Dake should be denied coverage through his failure of cooperation. (T. 46)

The first state court action filed shortly after the accident named both Wells and Dake as defendants

(T. 14). The complaint alleged that Wells was the owner of the truck and that defendants were operating it negligently. Claims by the others in the Jasper car were made directly against the insurance carrier and thus it was that this action for declaratory judgment was filed to the end of having the several controversies settled in one action. Dake was without funds so until the matter could be determined and to prevent a default, appellant defended Dake in the state court action under a reservation of rights agreement and defend Wells therein under the policy here in question. The answer filed in the state court action admitted the negligence of Dake and alleged affirmatively that Dake was not the agent of Wells (T. 66) in driving the truck and **further alleged that he was driving it without either express or implied consent from Wells.** Plaintiff there (Appellee Jasper here) filed a reply denying that Dake was driving the truck without consent of Wells. Also said appellee at that time filed an answer in this declaratory action alleging affirmatively that the question raised of whether Dake was driving the truck with permission of Wells was in issue in the state court action as a disputed fact in said pending action, further alleging that appellant was defending and controlling said state court action by its own attorneys. The state court action

was tried first and resulted in judgment entered by the court in favor of defendant Wells. The court disregarded the jury's verdict on the ground there was no evidence to support it. The state action is referred to here as a question arises whether the judgment there is *res adjudicata* as the judgment entered by the court was based on the fact that Dake was out on a personal joy ride at the time of the accident.

This action for declaratory judgment was tried by the court without a jury. No opinion was written by the court and thus we are left entirely in the dark as to what process of reasoning lead him to hold that Dake was driving the truck with permission of Wells; the court merely signed a formal findings of fact submitted by appellees, remarkable for being devoid of information. We believe under the rules of civil procedure (rule 52) appellant was entitled to a special finding of fact upon which the conclusion was made that Dake is entitled to protection under the policy, viz: Whether the court felt Wells gave Dake permission to use the truck to go joy riding; or whether he gave Dake permission to use the truck to go hunting and the joy ride was merely a slight deviation; or whether Dake acquired the right to use the truck from Sheldon; or whether there was an implied permission to use the truck growing out of permissive

prior use. These are pertinent questions to be answered in order to be able to place a construction on the meaning of the policy provision "provided the actual use of the automobile is with the permission of the named insured." To conform with the decisions of this court it would be necessary that Dake had permission to use the truck to go joy riding; it is insufficient to make such clause operative in favor of Dake that permission to use was given but for another purpose.

SPECIFICATION OF ERROR I

There is no competent evidence to support the finding that Dake was using the insured truck at the time of the accident with permission of the named insured, so as to constitute Dake an additional insured under the provisions of the policy.

Frederiksen v. Employers' Liability Assur. Corp.,
26 Fed. (2) 76.

Trotter v. Union Indemnity Co., 35 Fed. (2) 104.

ARGUMENT

The testimony shows Dake wanted to borrow Wells' gun to go hunting. Wells had his gun at his home at Jennings Lodge. On Friday afternoon, June 26, 1942, after the logging operations had shut down

for the week end, Wells drove the truck from Glenwood to Jennings Lodge. He took Dake with him, loaned Dake his gun and instructed Dake to drive the pick-up truck back to Gales Creek where it was usually kept over week ends. Wells testified that the truck was to be used by Sheldon, a member of the Wells crew, to go to the site of the logging operations on Sunday morning, June 28th, and fix the yarder whistle which was out of repair and giving trouble. Sheldon's work was that of engineer. Wells also testified that he liked to keep the truck at Gales Creek at that particular season of the year because of fire hazards which might require it to be put into emergency use. Wells testified that Dake had no authority or permission from him to take the truck on Sunday, June 28th for any purpose.

On Sunday morning, June 28th, Dake took the Wells truck which was parked at the Adkins residence at Gales Creek and drove up to the site of the logging operations and went deer hunting. He shot two deer and returned to the Adkins residence with the truck after having left the deer somewhere. Dake went on this hunting trip alone and explained his reason for it by saying that Sheldon did not show up. Dake had no permission from Wells to use the truck to go deer hunting but his testimony was to the ef-

fect that Sheldon had told him that he could use the truck to go deer hunting if he, Sheldon, did not show up. Dake testified (T. 131, 132):

“Q. Now when you left Wells, which was on Friday night two days before this accident, and you left at Oregon City or Jennings Lodge, wherever he lives; is that right?

A. Yes.

Q. You testified he told you to take the truck back to Gales Creek; is that right?

A. Yes.

Q. And did you take it back there?

A. I took it back to Gales Creek.

Q. Yes. Now what is the fact as to whether Sheldon, I think his name is, Corvin Sheldon, was to repair the yarder whistle on Sunday?

A. Well, I don't know whether he was—Mr. Wells give any orders to that effect or not, but then I know that Sheldon said we would fix the whistle when we went up hunting; but Sheldon and me was going to go hunting together, and we always figured on fixing that whistle while we was up there.

Q. Wasn't Sheldon to have the use of that truck that day to go up there to fix that whistle, to start out Sunday morning?

A. I didn't understand it that way.

Q. Hadn't you testified to that effect in your deposition and (78) also on the trial—

A. Well, I say there was two of us and I don't know whether I was supposed to drive it from Gales Creek up there or whether he was supposed to, as far as that goes.

Q. Well, yes; but didn't you testify—

A. As a general rule, yes, he drove because he was a better driver than I was.

Q. Yes; but wasn't it a fact that the truck was up there so Sheldon could take it up to fix that whistle and you were going to go along to ride so you could go hunting?

A. Yes; and there was another agreement between Sheldon and I, if he was not there I would take it and go anyway.

Q. That was between you and Sheldon?

A. Yes.

Q. But that wasn't between you and Wells then, was it?

A. Well, I don't know whether Wells knew anything about it or not.

Q. No. Well, your understanding with Wells was that Sheldon was going to take that truck up to fix the whistle and you were going to ride up with him to go hunting, wasn't it?

A. He didn't tell me I couldn't drive it." (Emphasis ours.)

And further on this same point Dake testified, in attempting to show a derivative permission from Sheldon to use the truck, as follows: (T. 133).

"Q. But what I am asking you about now is about Wells' arrangement there. He told you to take the truck back to Gales Creek, didn't he?

A. Yes.

Q. And you took it back?

A. Yes.

Q. Wasn't your understanding with Wells that Sheldon would go up there and fix the whistle and you were going to ride up with him because you wanted to go hunting?

A. My understanding of it was Sheldon and I was going to go hunting and we was going to fix the whistle. There was no—I don't know whether Sheldon was supposed to be paid additional for the job or not. I don't know whether he had any orders to that effect.

Q. You said that it was your understanding with Sheldon a while ago you two were going to go hunting; is that right?

A. Sure.

Q. Did you have that understanding with Wells?

A. I don't know whether I said anything to Wells about it or not."

Wells had no notion of letting Dake use the truck to go hunting or for any other purpose. Wells did understand that Dake probably would ride up to the logging operation with Sheldon and go hunting up there while Sheldon was fixing the yarder whistle.

The hunting trip was over, the deer had been put away somewhere, Dake had an early lunch and about

11:00 o'clock on Sunday morning, June 28th he again started off in the truck, driving west from Gales Creek. He testified in one place that he was on his way back to Round Top Mountain the site of the logging operations, to go hunting again, then he switched this story and said he was going up there to find an old iron camp cot. Dake testifying (T. 123-24):

"Mr. Miller: * * * started off the second time really did you intend to go hunting.

A. What I intended when I left Gales Creek, I intended to go back up on Round Top; that is where I was headed for.

Q. And did you intend to take another road in there; is that the—

A. Well, I was planning on going around—to tell you I never (69) did say just the exact reason for going up there, but I was—I went up there—I knew where there was an iron camp cot and it had been left up there from logging before and it was in good shape and I knew where that was at and I knew it was pretty good; so I intended to go after that and on the way I met these people, started to pass them and I picked them up. I told them I would take them as far as I was going, and at the time I got as far as I was going I got the intention to go on to Tillamook, too; so that is the way I gone to Tillamook.

Q. How far was Tillamook from the point where you intended to turn off?

A. Oh, it must be forty miles, I should judge. I wouldn't say for exact mileage, somewhere in the neighborhood of forty miles."

Regardless of Dake's purpose in starting out on his second trip it developed that he only got about a mile and a half out of Gales Creek when he ran onto a party of hitch-hikers, consisting of two women and one man. He picked these people up and the four of them started off on a joy ride and liquor drinking party which lasted about twelve hours from the time they started at 11:00 o'clock in the morning until 11:00 o'clock at night, the time the accident occurred. In the meantime they had driven something like 135 miles. (T. 144). Dake testified what started him on this trip (T. 126-27):

"The Court: Tell why you went down here. I read the facts you gave before. You said in your deposition you took a shine to one of the women is why you went on.

A. That is the reason I went on after I picked them up.

The Court: And you did some drinking down there?

A. Yes.

The Court: And you said something in your deposition about a man down there. Did that have anything to do with it?

A. Well, I had a cousin that I figured if he had—he wasn't working, if he had—if he wouldn't go up and go to work. I (72) knew Mr. Wells would take him if he hadn't got work himself. I got down there and he was—he was already working in the shipyards.

The Court: You said a minute ago, having a gun, you thought you might also see something to shoot down there.

A. I had that in mind when I started out.

The Court: I know, but after you started to go to Tillamook you didn't have any use for the gun then.

A. Couldn't take it out after I had seen them along the road there without coming back. I figured if one jumped out in front of the car I would go get him.

The Court: Really you changed your plan and went on down to Tillamook on account of running into these girls; was that it?

A. That is the main reason I went to Tillamook.

The Court: Did you have any further questions?

The Witness: If I hadn't picked them up I wouldn't have went to Tillamook."

The testimony is uncontradicted that Dake had no permission to take the pick-up truck on this joy ride. Dake testified (T. 138).

"Q. Did you have Mr. Wells' permission to drive the pick-up truck over to Tillamook and around to the beach and down to Wolf Creek Highway where this accident occurred?

A. No."

And on the same subject Wells testified (T-71):

“Q. You recall that on June 28th, 1942, your truck was involved in an accident?

A. Yes.

Q. When did you learn of the accident? I believe that it was Sunday.

A. I learned of it about 10:30 Monday morning.

Q. And who did you learn had been driving your truck?

A. Charles M. Dake.

Q. I will ask you to state to the Court whether Charles M. Dake had permission from you to drive that truck?

A. No, he did not.

The Court: Is Dake in the courtroom?

Mr. Powers: Yes.

The Court: Will you point him out to me?

The Witness: Back—(indicating).

Mr. Miller: Back of the room.

Mr. Powers: Q. The actual use that Dake was making of the truck at that time then was without your permission?

A. Absolutely.”

There was drinking going on all the time this foursome was out on the joy ride (T. 139 to 143).

In the state court action, it was contended by plaintiff that Dake had driven to Tillamook to look for his "cousin Mike" who might want to work for Wells. This on the theory that it would make Dake an agent of Wells at the time of the accident. Such contention was ruled out by the state court. It was clear to every one that Dake was out on a drinking joy ride with these hitch-hikers, without any permission from Wells to use the truck for that purpose or any other purpose. The court, in commenting upon the drinking party, during the trial below stated: (T. 147-48)

"The Court: Of course you have a question of causation here, gentlemen. When he got fired up with whatever he was drinking, why, he got some different ideas in his head—I suppose you will argue all that; but I can see the—what is it you call these automobile cases—intervening cause that breaks the chain of causation. So you have the intervening cause of alcohol. As far as his intention was concerned his story is very plain; He was going back to get himself some more meat. But he met the ladies and the gentlemen and he had three drinks, I think he said, and then he got some other ideas. Not an uncommon occurrence. It wasn't his original plan at all; he said so.

Mr. Miller: Q. And the man you were looking for was Mike Louis?

A. That is the fellow I intended to bring over. I knew he wouldn't be a rigging slinger, but I could use him over there as a second loader if he would go out in the woods.

Q. He was your cousin?

A. Yes. That would be if Mr. Wells would hire him after I had found out whether he was there or not."

It is submitted that under the evidence Dake is not entitled to insurance protection under the policy provision here. There is an entire lack of any evidence that Dake had any permission to use the truck at the time of the accident. This case is controlled by two decisions of this court which are considered as leading cases on the subject throughout the country, namely: *Frederiksen v. Employers' Liability Assur. Corporation, et al*, 26 Fed. (2) 76; and *Trotter v. Union Indemnity Co.*, 35 Fed. (2) 104; opinion of the district court in the same case reported in 33 Fed. (2) 363. The *Frederiksen* case is particularly in point, with the difference, however, that there was an original permission to use the car in the *Frederiksen* case which was absent here. This court there held that an omnibus provision would not extend coverage to the driver of a car who had permission from the owner to use the car for a particular purpose, namely, to attend a funeral in Oakland, who, thereafter, went off on a joy ride, and was involved in an accident.

The point being that permission to use the automobile for one purpose did not carry with it implied permission to use it for another purpose so as to bring the user within the provisions of the additional insured clause of the owner's insurance policy. The situation is summed up in the Frederiksen case in the syllabus:

“Where friend of owner of automobile, having received permission to take it for purpose of going to an early funeral, took additional joy ride in afternoon to town 40 miles away, driver's liability for injuries on return trip were not within owner's liability insurance policy, covering liability of person using or operating car “with the permission of the named assured,” in action by person injured to recover from insurer.”

And again in *Trotter v. Union Indemnity Co.*, 35 Fed. (2) 104, this court reaffirmed its earlier decision in the Frederiksen case. The Court states, P-106:

“It might not be unreasonable to say that the owner contemplated that while the enterprise was in progress Hickey and members of his immediate family would now and then use the car for pleasure, but, as suggested by the court below, to hold, in the absence of any affirmative expression of consent, that Grill contemplated or intended that Hickey would permit use by more or less intoxicated joy riders on the streets of Seattle at 4

o'clock in the morning would be against reason. Nor do we share in the view that express "permission" for a given purpose implies permission for all purposes. See *Frederiksen v. Employers, etc. Co.* (C.C.A.) 26 Fed. (2d) 76; *Denny v. Royal Indemnity Co.*, 26 Ohio App. 566, 159 N.E. 107; *Kazdan v. Stein*, 26 Ohio, App. 455, 160 N.E. 506; *Id.*, 118 Ohio St. 217, 160 N.E. 704. *Dickinson v. Maryland Sea Co.*, 101 Conn. 369, 125 A. 866, we do not think it necessarily contra, and if *Stovall v. New York Indemnity Co.*, 157 Tenn. 301, 8 S.W. (2d) 473, is opposed, we are unable to follow it."

In the light of these decisions no matter which view is taken of the lower court's reasoning in finding that Dake was using the truck at the time of the accident with permission of Wells, appellant is entitled to a reversal. There is no evidence here that would square up with any known theory of law which would change the plain import of the additional insured provision of the policy so as to make Dake an additional insured when the evidence shows that he was clearly nothing of the sort, as the "actual use" of the truck was not for any purpose for which he had any conceivable permission, express or implied.

SPECIFICATION OF ERROR II

The Court erred in failing to find for Plaintiff and Enter Declaratory Judgment accordingly.

Cronin v. Travellers Insurance Co. (N. J.) 18 A. (2d) 13.

Card v. Commercial Casualty Co. (Tenn.) 95 S.W. (2d) 1281.

Moschella v. Kilderry, 194 N.E. 728 (Mass.).

Lock v. General Accident Ins., 279 N.W. 55 (Wisc.).

Dickinson v. Great Am. Ind. Co., 6 N.E. (2d) 439 (Mass.).

Hunter v. Western & Surety Indemnity Co., 92 S.W. (2d) 878.

Indemnity Insurance Co. of N.A. v. Sanders, 36 P. (2d) 271 (Okla.).

Indemnity Insurance Co. of N.A. v. Lahman, 36 P. (2d) 274 (Okla.).

ARGUMENT

This specification of error is very nearly the same as the preceding one. What has been said there applies equally well here. There is the further point to be made under this specification, that Dake could acquire no derivative right through Sheldon to use the truck so as to make him an additional insured. It was Dake's testimony that Sheldon told him he might take the

truck to go hunting. Assume that such proposition is correct and overlooking for the moment that Dake had ceased hunting and had gone off on an extended joy ride at the time of the accident, we find the authorities hold that one person who has permission to use a car cannot permit another person to drive it and bring such second person under the omnibus provision of an insurance policy. Here, Sheldon did have the right to use the truck on Sunday morning for the specific purpose of driving up to the site of the logging operations to fix the yarder whistle. There is no evidence that Sheldon had any authority from Wells to let Dake drive the truck. The evidence is to the contrary. Taking Dake's testimony that Sheldon did say he could drive the truck to go hunting, this would create no right under the additional insured clause in favor of Dake. No derivative right can be conferred by one having permission to use another's automobile in favor of a third person, under a policy of insurance such as we have here. This is the holding in *Cronin v. Travelers Insurance Company*, (N.J.) 18 A. (2d) 13. The following is quoted from syllabus 1 of that case:

“Where insured named in auto liability policy permitted her son to use automobile, and son, without mother's knowledge, permitted another to take and drive the automobile, the other was not an

‘insured’ within clause extending coverage in others using automobile with permission of the named insured.”

A like situation was considered in *Card v. Commercial Casualty Company* (Tenn.) 95 S.W. (2d) 1281. The Tennessee Court reached the same conclusion, that no derivative right can be conferred under a policy of insurance to a driver of the assured’s automobile. In order for a driver to bring himself under the additional assured’s provision of such policy, he must be driving the car with the permission of the named assured and not with the permission of some person who is using the car with the permission of the named assured. The Court there held that the named assured’s discretionary power to select additional assureds can not be delegated. Also see *Hunter v. Western and Surety Indemnity Co.*, 92 S.W. (2d) 878; *Moschella v. Kilderry*, 194 N. E. 728 (Mass.).

Locke v. General Accident Ins. 279 N.W. 55 (Wisc.).

Dickinson v. Great Am. Ind. Co., 6 N. E. (2) 439 (Mass.).

Another way of stating the proposition is that permission to drive does not confer upon licensee the power to confer permission and one driving under such derivative permission is not an additional assured. This is the holding of the Supreme Court of Oklahoma in the cases of *Indemnity Insurance Co. of N. A. v. Sanders*, 36 P. (2d) 271, and *Indemnity Insurance Company of N. A. v. Lahman*, 36 P. (2d) 274. In syllabus 3 of the *Sanders* case it is stated:

“Where insured gave son-in-law permission to drive automobile on business trip to certain town, son-in-law could not extend such permission to include another’s driving of automobile in different city on following day; therefore driver was not ‘additional assured’ within protection of automobile liability policy.”

The foregoing decisions are in line with this court’s holding in *Trotter v. Union Indemnity Co.* *supra*, in which it held that Hickey, who had the right to use Grill’s automobile, had no right to turn it over to Bullock to use so as to make Bullock an additional insured under the owner’s policy of insurance.

SPECIFICATION OF ERROR III

There is no competent substantial evidence to support the finding that the "actual use" of the truck by Dake at the time of the accident was with permission of the named insured.

Lehl v. Hull, 152 Ore. 470; 53 Pac. (2d) 48, 54 Pac. (2d) 290.

Kazden v. Stein, 160 N.E. 704 (Ohio).

ARGUMENT

Dake stated that Wells did not tell him he could not drive the truck. Passing for the moment the evidence which shows that the members of Wells' crew well knew that no one could take the truck without Wells' permission and that Wells had never let anyone use the truck for pleasure trips, this statement of Dake respecting no specific direction from Wells not to use the truck, would not make him an additional insured under the policy. It takes more than a negative act—permission cannot be presumed. This is the holding in Lehl v. Hull, 152 Ore. 470; 53 Pac. (2nd) 48, 54 Pac. (2nd) 290. In which case the adult son of the owner of the car attempted to telephone his father in order to get permission to use the car. He was un-

able to talk with his father and took the car without express permission, although he had used the car on previous occasions. It was sought to hold the father liable under the family purpose doctrine. The court refused to infer any permission because of prior use of the automobile by the son. The court, on rehearing, in adhering to its opinion, said: (P. 482)

“When it is remembered that the mission of the son was to take a young man and two young ladies to the golf links for an evening’s entertainment and that the son’s effort to contact his father in order to secure the father’s permission to so use the car was fruitless, the conclusion is inescapable that the father had no interest whatever in the son’s enterprise upon that evening.”
And further: (P. 484)

“The sixth ground implies that the use of the car by the son on former occasions constitutes a basis for inferring either that the mission of the son on the evening of the accident was not as he said it was, or that some interest of the father was conserved in carrying out such an enterprise. Not even conjecture or speculation could devine any purpose or errand beneficial to or in the interest of the father in respect to such an enterprise; and there is not a suggestion in the records that the son went anywhere or did anything with the automobile on that occasion other than as he testified.”

That decision stands for the further point that it is not enough that a person who takes the car believes

the owner would permit him to use it if he asked for its use. Thus it can be seen that the fact Dake said Wells did not forbid him to use the truck cannot be spelled into a permission to use it, especially for the purpose of going joy riding with drinking companions at a time when the country is at war and there is a shortage of tires and priorities required that the truck be used in logging operations. There is no showing of any use of this truck by Dake or anyone else for similar purposes. The permission required in order to make the provision of the policy operative as to Dake is permission from the owner for the particular use being made of the truck at the time of the accident and there is no way from the evidence here that any such permission could possibly be spelled out. A person cannot delegate to himself permission to use another's vehicle and make the clause operative. The court in *Kazden v. Stein, et al*, 160 N.E. 704 (Ohio) in considering the question of implied consent of the driver to use a car, points out the necessity of mutuality and held that implied consent could not exist without the element of mutuality and points out there must be some action on the part of him who must consent. In other words it is insufficient for the driver of a car to say that he understood that he might use it. The proof must show mutuality and

must show that the owner did something which would constitute consent or permission to use the car. There could be no legal implication or any significance from the mere fact that a driver thought that he might use the car. It requires mutuality. It is just as necessary to show mutuality respecting implied consent as it is to show mutuality in express consent.

SPECIFICATION OF ERROR IV

The court erred in its finding and conclusion of law that the same issue was not adjudicated in the state court action as to Appellee Edward J. Jasper administrator of the estate of Emmett C. Jasper, deceased.

Associated Oil Co. v. Edgerton, 158 Ore. 607; 77 Pac. (2) 416;

Butler v. Maas, 163 Ore. 201; 94 Pac. (2) 1116;

Hall v. Zeller Brothers, 17 Ore. 381; 21 P. 192;

Bunnell v. Parelius, 160 Ore. 673; 87 P. (2d) 230;

Bunnell v. Parelius, 166 Ore. 174; 111 P. (2d) 88;

Lehl v. Hull, 152 Ore. 470; 53 P. (2d) 48, 54 P. (2d) 290;

Millar v. Semler, 137 Or. 610; 2 P. (2d) 233, 3 P. (2d) 987;

Miller v. Service and Sales, Inc., 149 Ore. 11; 38 P. (2d) 995;

Allum v. Ball, 168 Ore. 577; 124 P. (2d) 533.

ARGUMENT

One issue under the pleadings in the state court was whether Dake had taken this truck without the consent of Wells and was using it on a personal mission of his own at the time of the accident. This allegation is made in the defendant's answer in the state court action and denied by plaintiff therein. It is the law of the State of Oregon that when a person is involved in an accident while operating a motor vehicle owned by another that an inference arises that the driver is the agent of the owner and acting within the scope of his employment. In order to overcome this inference if in fact the driver is not an agent the owner is required to go forward with the evidence and show the true facts and if the facts shown are uncontradicted, that the driver was not about the business of the owner, then the inference is dispelled and the court can declare as a matter of law that the owner is not liable for the negligent operation of the car by such driver. It is essential under the Oregon decisions that the owner produce testimony disclosing the full facts under which the driver was using his car at the time of the accident in order to be entitled to the above rule.

Bunnell v. Parelus, 160 Ore. 673; 87 P. (2d) 230.

Bunnell v. Parelus, 166 Ore. 174; 111 P. (2d) 88.

Lehl v. Hull, 152 Ore. 470; 53 P. (2d) 48, 54 P. (2d) 290.

Millar v. Semler, 137 Ore. 610; 2 P. (2d) 233, 3P. (2d) 987.

Miller v. Service and Sales, Inc. 149 Ore. 11; 38 P. (2d) 995.

Allum v. Ball, 168 Ore. 577; 124 P. (2d) 533.

Thus it was in the state court action that Wells alleged affirmatively that Dake had no right to use the truck, that he had given him no consent to use it but that Dake had taken it and was on a personal mission of his own at the time of the accident. Testimony was developed on this point during the trial in the state court action (T. 170, 171, 172). Wills testifying.

“Q. Going back to the car, you say that he didn’t have your permission or authority, express or implied in any way, shape or form, to use that car on the day of the accident?

A. No.

Q. And it was to be used solely by Mr. Corwin, trip on his own private business.

A. Yes, except that he was to go up with him on a hunting.

Q. And Corwin was—or Sheldon was to drive the car?

A. Yes.

Q. Had Mr. Dake ever taken your car or used it without your permission and knowledge, express or implied, before this time, on the 28th of June?

A. No, not that I know of.

Q. Did he have any right to use the car on Sunday, the 28th, referring to Dake?

A. No.

* * * * (Cross Examination)

Q. Mr. Wells, you were here this morning when Mr. Norblad made his opening statement, were you not?

A. Yes.

Q. Did you hear him say that Dake, Charles Dake, practically stole the pick-up, that would be the evidence in this case?

A. I didn't hear him say that.

Q. You heard that statement?

A. Yes.

Q. Do you want to go on record as subscribing to that same statement made by your attorney, that Charles M. Dake stole this pick-up?

A. I think so.

Q. At the time of the accident?

A. Yes."

It was on this testimony that the state court entered judgment in favor of Wells. Appellee Jaspers' attorney here, working on this question of consent or

permission in the state court action, made a request to the court to have the jury make a special finding on this very question and the jury answered in the negative. (T. 182):

“2. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck either with the express or with the implied permission or consent of defendant Wells on defendant Dake’s own business? No.

3. Or, was defendant Dake at the time of the collision driving said pick-up delivery truck entirely without the permission or consent of defendant Wells and entirely on defendant Dake’s own business? No.”

A comparison of the record in this action with the transcript in the state court action, plaintiff’s exhibit 12 here, will show that the same issue was litigated in both actions. The state court action was tried first and the court there based its judgment upon the established facts there one of which is that Dake had no permission to use the truck. This factual issue became *res adjudica* and should have been declared such by the court below. The parties are considered the same. The appellant insurance company was not a nominal party to the state court action but it had

charge of the defense and the authorities under such a situation recognize the rule that the parties are to be considered the same. Cases holding that the insurance company is entitled to show that the matter is *res adjudicata* where it conducted the defense of a prior case in the name of an insured, are set forth in the annotation 123 ALR 708.

The matter of consent or permission was litigated in the state court action and by the judgment there the fact became established that Dake had no consent to use the truck and that issue is now *res adjudicata*. *Associated Oil Co. v. Edgerton, et al*, 158 Ore. 607, (77 P. (2d) 416) syllabus 6:

“A judgment or decree on the merits is a bar to subsequent action or suit between same parties on same claim as to every matter that was, or might have been, litigated.”

Butler v. Maas, 163 Ore. 201; 94 P. (2d) 1116; syllabus 4:

“The potency of a judgment as an estoppel concludes every fact necessary to uphold it, and extends, not only to matters actually determined but to every other matter which the parties might have litigated and have had decided as incident to and essentially connected with subject matter of litigation, and every matter coming within the legitimate purview of original action, both in

respect to matters of claim and defense, and a default judgment or one confessed, is attended with the same legal consequences."

Hall v. Zeller Brothers, 17 Ore. 381 (21 P. 192); syllabus:

"Former adjudication—Estoppel—Where a fact has been once litigated in a court of competent jurisdiction, the judgment rendered therein forever estops the parties and their privies from again litigating the same fact.

Verdict—In an action where there are numerous issues and a general verdict, it must be intended that the verdict is as comprehensive as the issues, and concludes every question of fact at issue.

Its effect—Where some specific fact or question has been adjudicated or determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not."

CONCLUSION

It is respectfully submitted the lower court erred with respect to each specification of error raised on this appeal and judgment should be reversed and a judgment entered in favor of appellant declaring that Dake's use of the truck was without permission and that he is not entitled to protection under appellant's insurance policy as an additional insured.

Respectfully submitted,

JAMES ARTHUR POWERS

Attorney for Appellant.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Appellant,

vs.

EDWARD J. JASPER, Administrator of the Es-
tate of Emmet C. Jasper, deceased; and AL-
BERT BROWN,

Appellees,

CHARLES M. DAKE,

Defendant.

APPELLEES' BRIEF

Appeal from the District Court of the United States
for the District of Oregon.

JAMES ARTHUR POWERS,
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FILED

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In the United States
Circuit Court of Appeals
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HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,

Appellant,

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EDWARD J. JASPER, Administrator of the Es-
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BERT BROWN,

Appellees,

CHARLES M. DAKE,

Defendant.

APPELLEES' BRIEF

Appeal from the District Court of the United States
for the District of Oregon.

**STATEMENT OF THE CASE BY APELLEES ED-
WARD J. JASPER, ADMINISTRATOR OF THE
ESTATE OF EMMET C. JASPER, DECEASED,
AND ALBERT BROWN.**

One route from Portland to the Oregon coast is westerly through Forest Grove, thence about seven miles to Gales Creek and on about six miles to Glenwood. From the latter place there are two routes, one southwesterly to Tillamook over the Wilson River

Highway, and the other northwesterly to Necanicum and Cannon Beach over the Wolf Creek Highway.

To reach the logging operation of Harold E. Wells on Round Top Mountain, one would drive about four miles westerly from Glenwood, turn to the right off of the Wilson River Highway and drive about seven miles to the operation. Wells operated on one side of Round Top in 1941 and on another side in 1942. He had a crew of eight men (R. 83) which included Charles M. Dake, his head loader, who went to work for Wells in July, 1941 (R. 93 and 105) and Corvin Sheldon, his engineer and handy man (R. 99). Wells was a logging contractor for C. E. Powell, his father-in-law, (R. 80, 85) with whom Wells lived at Jennings Lodge near Oregon City when Wells went home.

On the 1941 operation four of the men, including Wells and Dake, lived in a bunkhouse at the site of the work. The International pickup truck, owned by Wells and involved in the accident in the case at bar, was kept there (R. 74). It was probably a one ton truck (R. 144). Dake, with Wells' knowledge, drove the pickup some at that time to go hunting and to pick up guy wires and chokers (R. 74-75, 86, 106-107, 109). Sometimes Dake asked Wells for permission to use the pickup and other times he didn't ask him, although Wells was sometimes in the logging camp on week ends. If Dake wanted use of the truck he took it (R. 107). Wells allowed Mr. Haskins, with whom he at one time lived at Gales Creek, to use the pickup to haul furniture as well as wood about two or three

weeks before the trial (R. 89-90, 96) and about a week before the trial Wells permitted Corvin Sheldon to haul wood in the truck (R. 96). Wells never hesitated to send any of his men to take the truck on Round Top (R. 97). Dake probably used the pickup a dozen times while at the first camp, and he also used Wells' gun (R. 108). Wells knew that Dake had no gun, and Wells loaned his gun to Dake lots of times (R. 166). Wells also knew that Dake had no car of his own (R. 86).

In 1941 Dake was allowed by Wells to move Dake's personal property from Portland to Forest Grove in the pickup (R. 90, 95, 149-150). Dake also used the pickup to go fishing (R. 112-113), to obtain half a case of beer at Timber (R. 110-111), and he also drove it to Tillamook a couple of months before the accident (R. 149, 159).

On occasions Dake purchased gasoline for the truck and sometimes for a car owned by a friend (R. 109, 111). These purchases were at Round Top from the logging commissary. Dake was paid every two weeks, and his pay checks showed these deductions (R. 110). Wells saw most of the gasoline tickets (R. 85). Dake got gasoline for the trip of June 28, 1942, which resulted in the accident involved in the case at bar, from the loading tank which belonged to the logging job, filling both the tank of the pickup as well as a five-gallon can which he took along (R. 137).

During May and June, 1942, when Wells was logging at the second camp site, he lived during the work

week with Haskins at Glenwood and Dake lived during the work week and week ends with the Adkins at Gales Creek, about six miles easterly from Glenwood (R. 78-79). On the mornings of work days one of Wells' men, Dake part of the time, would drive the pickup from Gales Creek to Glenwood from whence Wells would drive to the camp. Upon return following work Wells would drive from the camp to Glenwood, where he got out, and one of his men would drive the truck back to Gales Creek. Necessarily the keys for the pickup were available or it couldn't have been driven. The pickup remained at the Adkins place in Gales Creek during the evenings and nights of working days and some week ends (R. 91, 112).

Wells was driving the pickup out of the woods on Friday evening, June 26, 1942, and Dake and Corvin Sheldon were with him in the front seat. A hunting trip between Dake and Sheldon was discussed, and it was also arranged to fix the horn on the yarder on the same trip. The pickup was to be used for these purposes on Sunday, June 28, 1942. All this Wells knew. (R. 81, 87, 114-116, 131-133). Wells drove the pickup to Jennings Lodge or Oregon City, with Dake as a passenger, so the latter could bring the vehicle back to Gales Creek. Wells, at Jennings Lodge or Oregon City, gave Dake Wells' rifle (R. 81). Dake testified that Wells expected part of whatever game Dake might kill (R. 128). At Wells' home at Jennings Lodge or Oregon City Wells said he threw an empty gasoline drum in the back of the pickup, to be

taken to the woods (R. 87); Dake thought he picked up two there (R. 116). Dake then drove the truck to Gales Creek, seven miles westerly from Forest Grove. Of course he had the keys to the truck (R. 87).

Sunday morning Sheldon didn't show up so Dake took the pickup and gun, went to the logging camp and killed two deer (R. 118) and returned to Gales Creek about 10 A. M. (R. 120). Tires on the truck were rationed (R. 99) but logging operations had priority as to tires and the truck had a "T" gasoline card (R. 102).

After eating at the Adkins, Dake started off in the pickup to hunt again with Wells' gun. He got one or one-half mile westerly from Gales Creek when he picked up the two women and a man (R. 121). He still intended to again hunt on Round Top (R. 148) or, if he could find no game there, at another place twenty or twenty-five miles from Gales Creek toward Tillamook (R. 148-149).

At this time and for some time before Wells was short-handed on his logging operation and had been doing the work of one man himself (R. 88-89). Wells had given his crew to understand he was looking for good men (R. 89, 147), and one reason for Dake's trip to Tillamook on that Sunday was to contact his cousin, Mike Lewis, and either bring him back to go to work on Wells' crew or have him contact Wells. The cousin was already working in a shipyard (R. 126, 147-148).

The relationship between Wells and Dake is illustrated by the employment above mentioned, the loans of the gun and the use of the truck and the further facts that at the time of trial Dake was paroled to Wells (R. 105) and went to work for Wells as his head loader immediately upon Dake's release from the penitentiary (R. 94).

SUMMARY OF ARGUMENT

The findings of the trial court have the same effect as the verdict of a jury. They should not be set aside unless clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses. Even inferences drawn by the trial judge go to support his findings.

In the two cases mainly relied upon by appellant, the defendants prevailed in the trial courts and the judgments were affirmed. Under the above rules, had those judgments been for the plaintiffs, they would still have been affirmed.

Permission to use the motor vehicle involved may be either express or implied.

Under the "omnibus clause" contained in the insurance policy involved in the case at bar appellant is liable. The Oregon law is that where the owner of a motor vehicle gives permission to another to use it, such use is covered by the owner's insurance policy even though the person using the vehicle uses it in a way or goes to places not contemplated by the owner.

The use of the adjective "actual" in the omnibus clause in its phrase "actual use" does not change the foregoing rule.

The issue in the present case of permissive use of the vehicle by Dake at the time of the accident, with the consent of the owner, Wells, was and is not made *res adjudicata* by the litigation in the state court.

ARGUMENT

I. ACTUAL USE OF TRUCK BY DAKE WAS WITH PERMISSION OF WELLS

This topic is the first of the two branches of the argument in appellant's brief, and we answer it as such.

THE FINDINGS BELOW

The court below heard all of the witnesses, no depositions having been taken. It found (R. 33-34) :

"That the actual use of the said International pickup truck by Charles M. Dake at the time of the collision hereinbefore mentioned, which is the automobile described in said policy of insurance issued by plaintiff and which policy is involved in this action, was with the permission of said Harold E. Wells, the named insured in said policy of insurance; that the actual use of said truck by the said Dake at the said time and said place of the said collision was within the contemplation of said Harold E. Wells."

This finding, as well as the finding on appellant's assertion of *res adjudicata* which we hereinafter dis-

cuss, have the same effect as the verdict of a jury.

28 U.S.C.A., Sec. 773.

National Surety Co. v. Globe Grain & Milling Co. (C.C.A. 9) 256 F. 601, 602, citing with approval

Dooley v. Pease, 180 U.S. 126, 21 S. Ct. 329, 45 L. ed. 457, 460, and

Meyer v. Everett Pulp & Paper Co., 193 Fed. 857, 863.

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part:

“* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

The preamble to this Court's own rules specifies:

“The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as a part of the rules of this Court with respect to appeals in actions of a civil nature.”

Rule 52(a) was cited and quoted from by this Court in

Gates v. General Casualty Co. (C.C.A. 9) 120 F. (2d) 925, 927

as follows:

“On this issue appellants must show the court's findings are ‘clearly erroneous’ due regard being ‘given to the opportunity of the trial court to judge of the credibility of the witnesses,’ all but one of whom was heard by that court.”

This Court, in affirming the decision of the same court which tried the case at bar, in

Rothman v. Wilson (C.C.A. 9, Ore.) 121 F. (2d) 1000, 1006

again cited Rule 52(a) and said:

“The evidence was conflicting and we feel bound by the findings of the trial court.”

Again in

United States v. Chinook Inv. Co. (C.C.A. 9, Ore.) 136 F. (2d) 984, 985

the same court was affirmed, this language being used:

“While the case is a close one on its facts, we are not prepared to say that the finding is clearly erroneous.”

To the same effect are

Clark & Wilson Lumber Co. v. McAllister (C.C. A. 9, Ore.) 101 F. (2d) 709, 714-715.

Lumbermens Mut. Casualty Co. v. McIver (C.C. A. 9) 110 F. (2d) 323, 324.

Even inferences drawn by the trial judge from the circumstances go to support the findings. In *Pacific American Fisheries v. Hoof* (C.C.A. 9) 291 Fed. 306, 308

the trial court had prefaced its general findings with the statement,

“I think it is established by positive testimony and inferences from circumstances adduced,
* * *.”

This Court said:

“What circumstances the court had in mind we are not advised. * * * but whatever the allu-

sion, it does not impair or lessen the effect of the general finding on the question of negligence.”

Appellant places great reliance upon the cases of *Frederiksen v. Employers' Liability Assur. Corporation* (C.C.A. 9, Cal.) 26 F. (2d) 76 and

Trotter v. Union Indemnity Co. (C.C.A. 9, Wash.) 35 F. (2d) 104

in each of which the lower court was affirmed. It is stated on page 105 of the latter decision:

“But it is unnecessary to discuss the evidence further than to show that in the most favorable view to appellant it is conflicting or that it is reasonably susceptible to opposing inferences. That being true, the findings of the trial court are controlling * * *.”

In both the *Frederiksen* and *Trotter* cases the defendants prevailed in the trial courts and the judgments were affirmed. Under the rules above stated, had the plaintiffs prevailed below, the judgments would still have been affirmed.

PERMISSION TO USE VEHICLE MAY BE EXPRESS OR IMPLIED

We believe that the evidence above summarized abundantly shows that Dake had express permission from Wells to use the pickup truck at the time of the accident. It is well settled, however, that such permission need not be express. Under the authorities it may be implied.

Hinton v. Indemnity Ins. Co. of North America (Va.)
8 S.E. (2d) 279, 283

“In *Tomasetti v. Md. Casualty Co.*, 1933, 117 Conn. 505, 169 A. 54, 55, a case somewhat similar in its facts to the instant case, it was held that the word ‘permission,’ unqualified by the adjective ‘implied,’ in an insurance policy, is used in the sense of leave, license or authority. Such permission, said the court, ‘is not necessarily limited to that granted by arrangement between the parties or otherwise in definite, express terms. It may arise and be implied from a course of conduct, pursued, with knowledge of the facts, for such time and in such manner as to signify, and be compatible only with, an understanding consent amounting to a grant of the privilege involved.’

“The word “permission” has a negative rather than an affirmative implication; that is, a permitted act may be one not specifically prohibited as contrasted to an act affirmatively and specifically authorized. That it appears in automobile policies would indicate that any one having permission or color of authority is included within the clause. * * *.’ *Brower etc. v. Employers’ Liability Assur. Co., Ltd., etc.*, 1935, 318 Pa. 440, 177 A. 826, 829.”

In

American Casualty Co. of Reading, Pa., v. Windham
(C.C.A. 5) 107 F. (2d) 88, 90

the following quotation is found:

“Permission to use a car may be implied in the absence of express prohibition.”

In

72 A.L.R.

in the annotation relating to “omnibus” coverage

clause, page 1375 at 1398, the editor thereof makes the following comment:

“‘Permission’ to take and use the car upon a particular occasion, within the meaning and effect of ‘omnibus’ clause, may, in a proper case, be implied by usage and common practice of the parties.”

In

Hodges v. Ocean Accident & Guarantee Corporation
(Georgia) 18 S.E. (2d) 28, 31

the following language is found:

“The term ‘permission’ is universally held to mean either express or implied permission.”

EFFECT OF “OMNIBUS CLAUSE” IN POLICY

The policy of insurance issued by appellant which is involved in this case includes a so-called “omnibus clause” which creates liability insurance not only for the benefit of the named insured but for the benefit of those who come under the clause and meet its requirements.

The principle is stated in the most recent A.L.R. annotation dealing with “omnibus” coverage clauses as follows:

126 A.L.R. 544, 545

“* * * independently of the general insuring clause in automobile liability policies, there often appears within the policy, or by way of a rider or indorsement attached thereto, a clause purporting, or the effect of which is, to extend the protection of the policy to any person or persons

coming within a defined group. This constitutes the so-called 'omnibus' clause * * *."

The policy involved in this case provides in part as follows:

"The unqualified word 'Insured' wherever used in coverages A and B and in other parts of this policy, when applicable to such coverages, includes the named Insured and, except where specifically stated to the contrary, also includes *any person* while using the automobile and any person or organization legally responsible for the use thereof, provided the *actual use* of the automobile is with the *permission of the named Insured*." (Italics ours.)

Had there been any restrictions as to time, place, route or purpose placed by Wells on the use of the vehicle by Dake or had the court below believed that the use of the vehicle by Dake at the time of the accident was not contemplated by Wells then, and then only, it would have been necessary for the trial court to decide which of two divergent lines of authority it would follow. The view of the case taken by the court below made this unnecessary. Should this Court decide that that view was wrong it will then want to consider the authorities which follow.

The authorities throughout the country are divided in their support of two different rules which are applicable to factual situations analogous to those involved in this case if, and only if, the Court views all of the evidence in the light most unfavorable to appellees.

One group of distinguished authorities holds that where the owner of a motor vehicle gives permission to another to use it, such use is covered by the owner's insurance policy even though the person using the vehicle uses it in a way or goes to places not contemplated by the owner.

Maryland Casualty Co. v. Ronan (C.C.A. 2)
37 F. (2d) 449, 450.

U. S. F. & G. Co. v. DeCuers (D.C., La.) 33 F.
Supp. 710, 712.

Dickinson v. Maryland Casualty Company, 101
Conn. 369, 125 Atl. 866, 869, 870, 41 A.L.R.
500.

Stovall v. New York Indemnity Co., 157 Tenn.
301, 8 S.W. (2d) 473, 476, 477, 72 A.L.R.
1368.

Peterson v. Maloney, 181 Minn. 437, 232 N.W.
790, 791-792.

Jefson v. London Guarantee & Accident Co., 293
Ill. App. 97, 11 N.E. (2d) 993, 995-996.

5 *Am. Jur. "Automobiles"* § 538, pp. 807, 808.

Annotation in 72 A.L.R. 1375 at 1401-1403, sup-
plemented in 106 A.L.R. 1251 at 1259 and
126 A.L.R. 544 at 552.

Another group of authorities holds that permission to use the vehicle by another includes only such use as was contemplated by the owner and that any use outside of such contemplation prevents the insurance policy coverage from attaching.

Frederiksen v. Employers' Liability Assur. Corporation (C.C.A. 9, Cal.) 26 F. (2d) 76.

Trotter v. Union Indemnity Co. (C.C.A. 9, Wash.) 35 F. (2d) 104.

Huddy, Cyclopaedia Automobile Law (9th Ed.) 407-409.

Annotation in 72 A.L.R. 1375 at 1403-1405, supplemented in 106 A.L.R. 1251 at 1260-1262 and 126 A.L.R. 544 at 552-553.

OREGON LAW

Under the familiar Erie decision and the similar decisions which followed it, the quest is always for the local law. The law in Oregon is in harmony with the Dickinson, Ronan and Stovall cases cited supra under the first line of authorities. The Oregon Supreme Court has cited those cases with approval in a case which has never been modified or departed from in the eight and one-half years since its rendition. In doing this the Oregon Supreme Court, inferentially at least, refused to adopt as the law in Oregon the two cases upon which appellant so heavily relies, the Frederiksen and Trotter cases, which arose, respectively, in California and Washington.

The Oregon case referred to is

Denley v. Oregon Automobile Insurance Co., 151 Or. 42, 47 P. (2d) 245 (47 P. (2d) 946 dealing with attorney's fees)

The case involved an automobile liability policy issued to Yamhill County and which provided that the described automobile was to be used by the county health nurse. It contained an omnibus clause to the

effect that coverage should apply to any person operating the car with the permission of the assured, and that such person should be known as an "additional insured." It was held that Judge Kennedy, County Judge of Yamhill County, was an "additional insured" while he was driving the car in the performance of his official duties. The court held that the policy covered the use of the insured car by the legal representatives of Yamhill County, notwithstanding a provision in the policy that the automobile would be used by "Health Nurse of Yamhill County." The court stated on pages 250-251 of 47 P. (2d) :

"In the following cases the court in construing a policy of insurance gave effect to conditions similar to the above 'additional assured' clause: *Dickinson v. Maryland Casualty Company*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500; *Maryland Casualty Company v. Ronan* (C.C.A.) 37 F. (2d) 449, 72 A.L.R. 1360; *Odden v. Union Indemnity Company*, 156 Wash. 10, 286 P. 59, 72 A.L.R. 1363; *Stovall v. New York Indemnity Company*, 157 Tenn. 301, 8 S.W. (2d) 473, 72 A.L.R. 1368. All these cases have placed a liberal construction on policies containing such clauses."

The Denley case stands for the proposition that in Oregon the bailee of a motor vehicle is an additional assured within the meaning of an omnibus clause such as that involved in the case at bar if the bailee had permission or consent to start out with the vehicle in the first instance.

The effect of so citing the Dickinson, Ronan and Stovall cases with approval is, of course, well understood in law. It was never better exemplified than in

Jones v. New York Casualty Co. (D.C., Va.) 23 F. Supp. 932, 934, 936, 937

where Judge Pollard said:

“Where there has been a deviation from the use for which permission or consent was granted, there is a division in the authorities as to the construction which should be placed upon the words ‘permission or consent of the named assured’ as used in the ordinary omnibus clause of an insurance policy. One line of authorities holds to the view that permission or consent to the particular use being made of the car must have been given, and in order to classify the person using the automobile as an additional assured under the policy he must be using the car at the time of the accident in a manner and for a purpose contemplated by the permission or consent given by the named assured. Another line of authorities holds to the view that only permission or consent to take and use the car must have been given, and in order to classify the person using the car as an additional assured all that is necessary is that he must have permission or consent to start out with the automobile in the first instance. The leading case in support of the doctrine last mentioned is *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500. That case has been followed by many others, notably the case of *Stovall v. New York Indemnity Co.*, 157 Tenn. 301, 8 S.W. (2d) 473, 72 A.L.R. 1368, and other cases cited in the note at page 1405.

* * * * *

“In view of the well-defined division in the authorities it does not seem probable that the Virginia Court would have ventured to cite with apparent approval the leading case adopting one of these views and base its conclusion at least partly on that doctrine unless it intended to embody that doctrine into the Virginia law; and this is especially true in view of the fact that the

Court had already given one apparently sound reason as the basis of its decision.

* * * * *

“From a careful consideration of these authorities, this Court is constrained to conclude that the Supreme Court of Appeals of Virginia has adopted as the Virginia law the doctrine announced by the Dickinson Case as applicable to a state of facts identical with the facts of that case. While the facts in the Dickinson Case and in the instant case are different in certain respects, they are in legal effect identical. This being so, it is the duty of this Court to find that the permission or consent given by Ruth Goodrick to Thomas Piercy to use the automobile, although qualified, must be construed in contemplation of the policy as a permission or consent for Thomas Piercy to use the automobile for the purpose it was being used at the time of the accident, and that Thomas Piercy was within the contemplation of the policy using the car at the time of the accident with the permission or consent of the named assured.”

The Jones case was cited with approval in

American Casualty Co. v. Windham (C.C.A. 5)
107 F. (2d) 88, 90

and in

American Casualty Co. v. Windham (D.C., Ga.)
26 F. Supp. 261, 264

EFFECT OF THE ADJECTIVE “ACTUAL” IN THE PHRASE “ACTUAL USE”

Motor vehicle policies formerly provided, in the omnibus clause:

“* * * provided the use of the automobile is with the permission of the named insured.”

They now generally provide, as does the policy in the case at bar:

“* * * provided the actual use of the automobile is with the permission of the named Insured.”

That this distinction is without a difference is shown by

Vezolles v. Home Indemnity Co. (D.C., Ky.) 38 F. Supp. 455, 457-458, 458 (affirmed in 128 F. (2d) 257)

where the court said:

“The defendant contends that the issue presented by the cases above referred to is not the one before the Court in this case because of the wording in the policy here involved which differs from the wording of the policies in those cases. In those cases the policies provided in substance that the insurance covered an operator of the car other than the owner if the use or operation of the car was with the permission of the named assured. In the present case the policy requires that ‘the *actual* use’ be with the permission of the named assured. (*Italics* our own). It is contended that the phrase ‘actual use’ is much more limited in its scope than the word ‘use’ as contained in earlier policies; that it means that the particular use made of the vehicle both at the time of the accident and at the place of the accident must be actually authorized by the owner,
* * * The distinction as claimed by the defendant and supported by Appleman is discussed, criticized and rejected in *Haeuser v. Aetna Casualty & Surety Co.*, *supra*. ‘Actual use’ means the use of the car at the time under consideration, as contrasted with the ‘declared use’ which refers in the policy to a future contemplated use. The use of the car by one other than its owner is in fact

its actual use. In my opinion the question presented is the same regardless of the different wording in the more recent policies.

“* * * The purpose of the omnibus clause was to extend the coverage beyond the limitations which would otherwise exist under the law of principal and agent.”

The following language appears in

Haeuser v. Aetna Casualty & Surety Co. (La.) 187 So. 684, 688

“The views of Mr. Appleman are confidently relied upon by counsel and are pressed upon our consideration. We find ourselves, however, unable to agree with Mr. Appleman’s conclusions. The change from ‘use’ to ‘actual use’ does not seem to us in any sense important nor is the purpose clear. Moreover, the statement that ‘under the newer wording it is almost essential that the use made of the vehicle at the time of the accident must be one actually contemplated by all parties when the bailment was made’ seems to us entirely gratuitous. The important word in the last proviso of the clause is ‘permission’. The automobile must have been used with the ‘permission’ of the named assured and it must actually have been used with the ‘permission’ of the named assured. The introduction of the word ‘actual’ as a qualification of the word ‘use’ is said to change the connotation of the text so as to mean use within the scope of the permission granted. If the proviso as it appears in the present policy could be so interpreted the one considered in *Parks v. Hall*, *supra*, may also be so construed for if we interpolate the equivalent of the phrase ‘within the scope of the permission granted’ in the one case we may do so in the other, there being no words of such import in either proviso. The reliance upon the word ‘actual’ as a qualification of ‘use’ to bring about this remarkable result seems

to us untenable.

* * * * *

“It would have been so simple to have indicated that intention by the use of appropriate language such, for instance, as requiring that the use of the automobile be within the scope of the permission granted.”

II. APPELLANT'S CLAIM OF RES ADJUDICATA

The judgment of the state court in the litigation entitled “Edward J. Jasper, Administrator of the Estate of Emmet C. Jasper, deceased, Plaintiff, vs. Harold E. Wells and Charles M. Dake, Defendants” (R. 14-22, 36-41) was on December 30, 1943, affirmed by the Oregon Supreme Court. At present writing the opinion in that case has not yet appeared in the advance sheets of the Pacific Reporter. It is to be found in Vol. 37, No. 13, Ore. Adv. Sheets, December 30, 1943, page 585.

This opinion merely leaves the case at bar in exactly the same condition it was in before the opinion was handed down, that is, exactly as it was when the present case was tried in the court below. It has long been the Oregon law that the pendency of an appeal does not affect application of the doctrine of res adjudicata in a situation where that doctrine should be applied.

Ton Toy v. John Gong, 87 Or. 454, 170 Pac. 936, 938

“In this state it is the established rule that the force of a decree as a plea or as evidence remains unimpaired until it is reversed or modi-

fied, and consequently Ton Toy was entitled to use the decree as evidence to support his plea of former adjudication." (Citing cases)

To the same effect is

Jaloff v. United Auto Indemnity Exchange, 121
Gr. 187, 253 Pac. 883, 886.

Appellant on page 33 of its brief sets forth the last two special findings of the jury in the state litigation. It neglected to set forth the first special finding, which was as follows:

"Was defendant Dake at the time of the collision driving said pickup delivery truck as the agent, servant or employee of defendant Wells and in pursuance of Wells' business? Yes."

Appellant's claim (complaint) in the case at bar alleges that Dake was on a personal mission of his own at the time of the accident and that he was then using the pickup truck without the permission of Wells (R. 4, Par. VI). That was the issue tendered by appellant in the present case. The claim alleged the pendency of the state litigation (R. 4, Par. VII). Appellees desired to raise the defense of the adequacy of appellant's remedy at law in the state litigation but could not do so by demurrer, demurrers being abolished by Federal Rule of Civil Procedure 7(c). This defense was, therefore, raised by them in their answers in which, as a first affirmative defense that appellant's claim failed to state a claim, the pendency of the state litigation was alleged. The proffered defense was resolved against appellees, the lower court

finding jurisdiction and proceeding to enter findings, conclusions and judgment.

Appellant will not in its reply brief or in oral argument deny that in opposition to said defense it served on counsel for appellees and handed to the court below its "Memorandum of Authorities submitted by Plaintiff at Pre-Trial Conference" in which appellant stated:

"In this respect the Court's attention is called to the distinction herein of the policy provision namely that liability shall attach under the policy to drivers of the car other than the owner provided 'the actual use of the automobile is with the permission of the named insured.' There is no such issue between the parties in the State Court action."

The complaint in the state litigation alleged that the defendants, i. e., Wells and Dake, operated the vehicle negligently in certain specified respects at the time of the accident (R. 16-17, Par. V). This is, of course, a familiar method of alleging agency.

L. B. Menefee Lumber Co. v. MacDonald, 122 Or. 579, 260 Pac. 444, 447

"The act of the agent can be charged as the act of the principal."

To the same effect is

Independence Indemnity Co. v. Grants Pass & Josephine Bank (C.C.A. 9, Ore.) 29 F. (2d) 83, 85

In the State litigation both Dake (R. 19-20, Par. I) and Wells (R. 21, Par. I) denied the alleged agency

and affirmatively alleged that Dake's use of the truck was without Wells' permission or consent. This affirmative allegation did not, and for the reasons hereafter shown could not, go to the broader conception of "permission" involved in the case at bar. It went merely to the more narrow concept of permission involved in any agency. To establish agency the principal's consent or permission, express or implied, is necessary.

Kantola v. Lovell Auto Co., 157 Or. 534, 72 P. (2d) 61, 62

"'Agency,' as defined by the American Law Institute, Restatement of Agency, § 1, 'is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'"

This same distinction between the two concepts of the word "permission" distinguishes the bulk of the cases cited upon appellant's brief, since they are cases involving questions of agency.

Kazdan v. Stein (Ohio) 160 N.E. 704

(P. 28, appellant's brief) involved the consent clause of a liability policy, but the case, like the Frederiksen and Trotter cases, was merely affirmed on conflicting evidence.

In the state litigation liability of Wells could not be predicated upon his mere permission to Dake to use the pickup, in the absence of allegations and proof that the vehicle was in some manner defective and that Wells knew or should have known that, or that

Wells knew or should have known that Dake was an incompetent driver. No such allegations were made in the state litigation. There is no Oregon decision or statute which makes the owner of a motor vehicle liable for the negligence of a bailee of the vehicle. The Oregon cases are to the contrary.

Brown v. Fields, 160 Or. 23, 83 P. (2d) 144, 145-146, 146

“The authorities are numerous supporting the proposition that, where an automobile is turned over, by an owner, to a prospective purchaser who drives it for the purpose of testing it out, the relationship of bailor and bailee is created and the doctrine of respondeat superior has no application. (Citing cases.) It is equally well settled in the absence of statute to the contrary that the bailor can not, under such circumstances, be held liable to some third person for the negligence of the prospective purchaser unless the bailor knew or had reasonable grounds for believing that the prospective purchaser was so careless, reckless and incompetent that injury to others might reasonably be anticipated from his operation of the car.

“* * * We conclude that the only reasonable deduction to be made from the evidence is that the defendants had no reasonable ground for believing that Charles Walsborn was incompetent to drive the automobile, and, since the relationship of bailor and bailee existed, the defendants are not liable.”

Kantola v. Lovell Auto Co., 157 Or. 534, 72 P. (2d) 61, 63-64

“In 5 Am. Jur. § 353, p. 694, the authors say: ‘At common law, liability for the negligent use of an automobile by one other than the owner can-

not be predicated against the owner merely because of such ownership.'

"It is stated by the author in Huddy, Encyc. of Automobile Law, (9th Ed.) vol. 7-8, at page 297, that: 'It is clear that, when the owner of an automobile permits another to have the possession and use of it as a bailee, the owner is not liable for the negligent conduct of such bailee. In such a case, the borrower, not the owner, is the person liable for negligence in its operation.'

"It is not even suggested in the record that Kildall was an incompetent driver or, if incompetent, that the defendant had knowledge of that fact. Nor is it suggested that he was an unlicensed driver or that the automobile was out of repair and not suitable for the purposes for which it had been delivered to Kildall. There was, therefore, no ground upon which the bailor could be held liable for the negligence of the bailee."

This distinction is well stated in the case of

Vezolles v. Home Indemnity Co. (D.C., Ky.) 38 F. Supp. 455, 456 (affirmed in 138 F. (2d) 257)

where the court said:

"The third paragraph of the answer pleading the state court judgment as a bar was stricken by the Court on plaintiff's motion. The issue involved in the state court trial was not the same issue as was involved in this action. The directed verdict in favor of Morton decided that Ruemmele was not the agent of Morton. It did not decide that Ruemmele was using the car without the permission of Morton. Liability on the part of Morton in that action was predicated upon the relationship of principal and agent. Liability on the part of the Insurance Company in the present case is predicated upon the fact of permissive use of Morton's car by Ruemmele. The relationships of principal and agent and permissive use are en-

tirely different. Permissive use of the car by Ruemmele could exist without the relationship of principal and agent existing."

The principle is also stated in

Western Casualty & Surety Co. v. Strozier (Ga.) 19 S.E. (2d) 433, 435

as follows:

"It should be noted that the rules of law used in determining the liability of an insurance company which issued the automobile liability policy to the master are not necessarily coextensive with the ordinary rules of master and servant as would be applied if a suit was against the master for the negligent acts of the servant injuring a third person."

Any reference to the word "permission" in the opinion of the Oregon Supreme Court in the state litigation must be confined to the agency permission involved in that litigation. To extend such reference further than that would be to employ dicta as authority. In

Mutual Orange Distributors v. Agricultural Prorate Commission (D.C., Cal.) 30 F. Supp. 937, 941

wherein a statutory three judge court sat, Mr. Justice Stephens said:

"The idea that such a proceeding could be prevented by rushing ahead and having a pronouncement made that the Prorate Act in the abstract was constitutional was erroneous in itself. We hold that the expressions on the constitutional questions in the prohibition case were dicta. Dicta, of course, is not authority (*Norris v. Moody*, 84 Cal. 143, 24 P. 37), and cannot be

the basis for res judicata or the basis for the 'face of the judgment rule' as argued by the Commission in this case."

The matter of "permission" involved in the case at bar has not been determined by the state litigation.

Ross v. Beacham (D.C., S.C.) 33 F. Supp. 3, 8

"A judgment is not conclusive on any point or question which from the nature of the case, the form of action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered."

National Surety Co. v. Jenkins (C.C.A. 8) 18 F. (2d) 707, 710

"Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily determined by the decree, in the former suit, it is not concluded by that decree, although it was put in issue by the pleadings."

This case was reversed on other grounds in 48 S. Ct. 445, 277 U.S. 258, 72 L. ed. 874. On the above point, at p. 876 of the Law Edition the court said:

"We think the court below was right in holding that the earlier litigation had determined only that the National Surety Company was not entitled to be subrogated to the treasurer's claim and remedies against the insolvent bank until he had been paid in full, and in no way involved the National Surety Company's present separate claim on its contract of indemnity, and that the plea of res judicata was consequently ineffective."

To like effect are

Gamble v. L. B. Menefee Lumber Co., 149 Or.
79, 39 P. (2d) 667, 668, and

Norwood v. Eastern Oregon Land Co., 139 Or.
25, 5 P. (2d) 1057, 1061.

On the issue of res adjudicata the court below found (R. 32-33) :

“That the judgment entered in the action entitled Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased, plaintiff, versus Harold E. Wells and Charles M. Dake, defendants, which action was tried in the Circuit Court of the State of Oregon for Clatsop County, is not res adjudicata as to the defendant Edward J. Jasper, administrator of the estate of Emmett C. Jasper, deceased; that the issues decided in said state court action are not determinative of this action; that the defendants are not barred from asserting their defenses herein; that the same issue or issues herein were not tried and determined in said state court action; that there is not an estoppel of judgment against the defendants as a result of the said judgment entered in said state court action.”

Under the first dozen authorities cited in this brief this finding should be permitted to stand.

CONCLUSION

We respectfully submit that under the local law which the trial court applied under the doctrine of the Erie case and under the better law in effect over the nation, the trial court's opinion, findings and conclusions and judgments were correct and should be affirmed.

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Of Counsel for Appellees.

9
No. 10580

In the United States
Circuit Court of Appeals
For the Ninth Circuit

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Appellant,

vs.

EDWARD J. JASPER, Administrator of the Estate of Emmett C.
Jasper, deceased; and ALBERT BROWN,
Appellees.

CHARLES M. DAKE,

Defendant.

Appellant's Reply Brief

Appeal from the District Court of the United States
for the District of Oregon

JAMES ARTHUR POWERS,
Attorney for Appellant.

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FILED

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PAUL P. O'BRIEN,
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No. 10580

In The United States
Circuit Court Of Appeals
For The Ninth Circuit

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Appellant,

vs.

EDWARD J. JASPER, Administrator of the Estate of Emmett C. Jasper,
deceased; and ALBERT BROWN,

Appellees.

CHARLES M. DAKE,

Defendant.

Appellant's Reply Brief

Appeal from the District Court of the United States
for the District of Oregon

Respecting specifications of errors I and III appellees makes several contentions which herein have been separated and are discussed under point headings.

POINT A.

That Dake had express permission originally to take the truck citing a line of authorities which

express the view of a small minority that where the original taking is with express permission of the owner, the driver is considered an additional insured under an automobile public liability policy even though he be involved in an accident while using the car for some other purpose than the original purpose for which permission was given. These authorities appear on p. 14 of Appellees' brief. Generally, they applied the rule announced in the comparatively early Tennessee case of *Stovall v. New York Indemnity Company*, 8 S. W. (2d) 473. Originally it was thought by some that no matter how great the departure was from the original permission granted, that nevertheless the driver should be considered an additional assured under the policy. The most that this minority line of authorities stand for now is that when there is a "slight deviation" from the use for which permission was originally granted, then the permittee is entitled to be considered an additional insured under such a policy of insurance. This small minority line of authorities is gradually disintegrating. In the first place it is to be observed that the facts in each of the so-called minority decisions concerned an employee whose employment required the regular use of a car, such as salesmen and chauffeurs and who drove the particular car in

question beyond the limits of the sales territory, or, in the case of a chauffeur, beyond the place for which the express permission was given. The courts now applying the minority rule refer to it as the "slight deviation" rule. The minority rule thus has gradually switched to the view of the great weight of authorities which follow the decision of this court in *Frederikson v. Employers Liability Assur. Corp.* (C.C.A. 9, 26 Fed. (2d) 76). The states of Tennessee, Minnesota, Illinois, Louisiana and possibly Connecticut, originally made up the minority view. The modification of the original rule can be observed in later decisions from the respective jurisdictions. For the trend in Tennessee, see *American Auto. Insurance Co. v. Jones*, 45 S. W. (2d) 52; and *Preferred Accident Insurance Co. v. Barker*, 104 Fed. (2d) 424, 426 wherein the Federal Court, in reviewing the Tennessee law, states:

"In the case of *Romines v. Preferred Accident Insurance Company*, unreported, decided by the Supreme Court of Tennessee on November 26, 1932, the assured directed the employee to take his car two blocks and put it in a garage. Instead of carrying out instructions, he drove some distance out on a highway, had a collision and injured the plaintiff, occupant of the other car. The employee was sued, judgment obtained and insolvency appearing, the plaintiff sued under the 'omnibus' clause of the policy. The court, in referring to the *Stovall* case, said 'that a distinction

should be taken between the scope and legal implications of a permission like that given to a salesman intrusted with a car and a permission to use a car for a specified purpose for a limited time. Here the owner of this car was in legal possession thereof at a point within two blocks of a garage to which he directed the driver of the car to proceed. This driver had been employed for a particular purpose. That purpose had been nearly accomplished. The owner of the car intended that the driver should relinquish possession at the garage within five or ten minutes. The accident occurred at a point far distant from the garage to which the car was destined by its owner and at a time several hours later. To say that such deviation from the orders given by the owner with respect to his car could be construed as a use of the automobile with the permission of the owner is too strong a statement."

The same trend is noted in Minnesota: *Liberty Insurance Co. v. Stilson*, 34 Fed. Sup. 887; and in Louisiana, *Farnet v. DeCuers*, decided 1940, 195 So. 797. And in Connecticut, *Mycek v. Hartford Accident and Indemnity Company* (d. 1941), 128 Conn. 140, 20 A (2d) 735.

There is another reason why the early minority decisions are disintegrating and that is a change which had been made in the policy provision since those cases were decided. The language of the policy has been changed to read, provided "actual use" is

with permission of the named insured. Formerly, the word "actual" was not in the provision. Generally the courts are construing these words to mean just what they say: that the ACTUAL USE at the time of the accident was with permission of the named insured.

The reframing of the omnibus provision by inserting the words "actual use" is commented upon by the Supreme Court of Pennsylvania (1939) in *Laroche v. Farm Bureau Mut. Automobile Ins. Co.*, 7 Atl. (2d) 361, 363:

"It is to be noted that in the present policy the phraseology employed is 'provided * * * the actual use is with the permission of the Named Insured.' Perhaps a better term for what evidently was intended by the use of this adjective would have been 'the particular use.' In Appleman on Automobile Liability Insurance, p. 110, the term 'actual use' is said to be designed to defeat the minority view that, if permission to use the car is given by the insured, the permission need not cover the specific purpose for which the car is being driven at the time of the accident."

The Federal District Court, W. D. Wisconsin (1940) in *Johnson v. Maryland Casualty Co.*, 34 Fed. Sup. 870, considers these new words "actual use" in an omnibus provision of an insurance policy, page 871:

“There being no permission for the actual use, there was no coverage extended by the terms of the terms of the policy to Wirth. The deviated use in this instance cannot be said to be with the permission of the named assured, and no liability exists on the part of the defendant to the plaintiff under the terms of the policy defendant issued to Swift & Company. Actual use means the use to which the automobile is being put at the time of the collision with the permission of the named insured. It can mean nothing else. *Caldwell v. Standard Accident Insurance Co.*, 6 Cir., 98 F. 2d 364; *American Casualty Co. v. Windham*, D. C., 26 F. Supp. 261; *Columbia Casualty Co. v. Lyle*, 5 Cir., 81 F. 2d 281; *Laroche v. Farm Bureau Mutual Automobile Insurance Co.*, 335 Pa. 478, 7 A. 2d 361.”

Liberty Mut. Ins. Co. v. Stilson, 34 Fed. Sup. 885, 887 (Minn.):

“Nor do the facts here permit of a consideration of the so-called “slight deviation” doctrine. As stated, Homer Stilson testified that he knew that his father would never let him take the car to Chicago. C. W. Stilson testified that had he known what the son contemplated he would never have permitted the automobile’s use for the trip. Therefore, Homer Stilson possessed no authority from his father for the “actual use” to which he put the car. Express permission for a given purpose does not imply permission for all purposes. See *Trotter v. Union Indemnity Co.*, 9 Cir. 35 F. 2d 104; *Frederiksen v. Employers’ Liability Corp.*, 9 Cir. 26 F 2d 76. For a discussion of “actual use” see recent text-book Appleman on Automobile Liability Insurance, pages 110-116.

The defendants rely on *Peterson v. Maloney*, 181 Minn., 437, 232 N. W. 790; *Stovall v. New York Indemnity Co.*, 157 Tenn. 301, 8 S. W. 2d 473, 72 A.L.R. 1368; and *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500. These cases did not contain the same language in their respective policies as that here involved and it might be inferred that the language of the insurance policy now before the court was adopted to avoid the claimed ambiguity in these cases. I do not understand that the Minnesota court has ruled that in any case once permission is given for the use of the car, liability follows under the omnibus clause of the policy. Certainly no similarity in factual situation exists between this case and those relied upon by the defendants. The *Maloney* case possessed no element of fraud or deceit and obviously implied authority to use the car existed when and for the purpose it was used. The *Dickinson* case involved a slight deviation only. Here a lie bottomed Homer Stilson's permission to use the car. Consent to use being obtained by deceit, how with minds thus apart can consent be implied for permission to use the car?"

The foregoing decisions are in harmony with the majority view. The *Frederickson* decision by this court is repeatedly cited for the majority view which requires that the use being made of a car at the time of the accident be with the permission of the named insured and that it is insufficient that the person driving the car had permission to use it for some other purpose or to make some other use of it. A

recent case citing the Frederickson decision with approval is *Hodge v. Ocean Accident & Guarantee Corp.*, (Ga. 1941), 18 S. E. (2d) 28, which case cites the following Authorities for the same view:

Denny v. Royal Indemnity Co. (Ohio) 159 N. E. 107;

Johnson v. American Auto Ins. Co. (Me.) 161 A. 496;

Columbia Cas. Co. v. Lyle (5 C.C.A.) 81 F. 2d 281;

Byrne v. Continental Cas. Co., (Ill.) 23 N. E. (2d) 175.

The Pennsylvania Supreme Court in *Laroche v. Farm Bureau Mut. Automobile Ins. Co.*, *supra*, in analyzing the two lines of decisions, states, p. 362:

"Their study reveals that it is the rule in some states that if the original bailment was made with the consent of the insured it is immaterial that subsequently the automobile is driven to a place or for a purpose not within the contemplation of the insured when he parted with possession; accordingly the insurance company is held liable even though the accident happens while the car is being used on an errand not embraced within the limits of the permission given. But in the majority of jurisdictions it is held that, while slight and inconsequential deviations will not annul the coverage of the omnibus clause, there is an absence of 'permission,' within the meaning of the policy, if the car is being driven at a time or place or for a purpose not authorized by the insured. The differ-

ence between these two views resolves itself largely into whether, as pointed out in *Dickinson v. Maryland Casualty Co.*, 101 Conn., 369, 125 A. 866, 41 A.L.R. 500, the word 'permission' is to be construed as meaning permission to use the car, or permission to use the car in a specified manner and for a specified purpose.

"In our own state the trend is markedly in the direction of the majority view. In *Powers v. Wells*, (115 Pa.) Super, 549, 176 A. 62 and in *Truex v. Pennsylvania Manufacturers' Association Casualty Insurance Co.*, 116 Pa. Super. 551, 176 A. 756, in each of which there were substantial deviations from the purpose for which permission to use the car was given, it was held that there could be no recovery on the policies. In *Brower v. Employers' Liability Assurance Co., Ltd.*, supra, and in *Ferguson v. Manufacturers' Casualty Insurance Company of Philadelphia*, 129 Pa. Super. 276, 282, 195 A. 661, the question was discussed but the decisions were placed upon other grounds. In *Randig v. O'Hara*, 123 Pa. Super. 251, 187 A. 83, a general authority to operate the automobile had been given by the insured, and it was held that this was not abrogated or suspended by language which, in the opinion of the court, amounted to an expression of wishes rather than a revocation of the authority."

The Court then discusses the new phraseology contained in the omnibus provision "actual use" and the reason therefore namely, to overcome the original minority view.

Appellees' brief makes the blunt statement that

Dake had express permission to take the truck but makes no reference to the record to bear this statement out. There is no evidence in the record of any express permission. The only two persons who testified concerning it were Wells and Dake. Wells testified that he had given no permission to Dake to use the truck. Dake called as a witness on behalf of appellees admitted he had no permission from Wells to take the truck on the joy ride. The most Dake would say was that he had an understanding with Sheldon (not Wells) that if Sheldon did not show up Sunday morning that he, Dake, could take the truck and go hunting up near the logging operations. There are no authorities which spell out an express permission from the owner through a situation of this sort. One having permission to use another's car cannot extend that permission to a third person so as to bring the third person within the omnibus provision of this type of Insurance policy. This matter is briefed under Specification of Error No. 2 in Appellant's original brief. Appellee's brief does not controvert it.

And finally we have the decision of the Supreme Court of Oregon in the state court action which arose out of the same accident and involved the identical facts, holding outright that Dake had no per-

mission to use the truck. Jasper, Adm. v. Wells, Dec. 30th, 1943, Oregon Advance Sheets Vol. 37, p. 585. At p. 588 the court states:

“The evidence given by the defendant Wells was direct, repeated, positive, without contradiction or impeachment and may be summarized as follows: Dake was in the general employ of Wells as a top loader in the camp. He was not in the employ of Wells on Sunday, the 28th of June, **nor was he authorized, directly or indirectly, to take the truck on that day for any purpose.**” (Emphasis ours.)

P. 588-589: “Wells never allowed the men to use the truck without special permission, of which fact Dake was aware. Dake had never, to Wells’ knowledge, used the truck unless Wells told him to do so as a part of his work, in and near the camp. Wells had given Dake special permission the previous summer to use the truck for a hunting trip over private roads only. Dake had not, to his knowledge, used the truck for any such purpose since that time. **Wells had no knowledge that Dake was going to take the truck on Sunday, the 28th, or that Dake was going to Tillamook on that date.** Dake’s testimony was to the same effect; namely: that he drove the truck **without Wells’ permission** or knowledge. The trip to Tillamook was for his own pleasure. He had no purpose relating to Wells or to Wells’ business in going on the trip. There is not a hint of conflicting testimony as to what Dake actually did or where or with whom he went.” (Emphasis ours.)

Under the new words “actual use” now contained in the policy, it would seem clear under the uncon-

tradicted evidence in this case that the plaintiff is entitled to declaratory judgment of non-liability under its policy. The uncontradicted evidence is that Dake had no permission, express or implied, to take the car to go on a drinking carousal. Even under the doctrine of the early minority, Dake would not be considered an additional insured. No case has been found in which the driver was considered an additional insured under such a policy, under facts such as we have here. Dake's drinking trip covered a distance of some 135 miles, the trip began before noon and came to a halt shortly before midnight when he met with the accident referred to. There is not the slightest suggestion that Wells ever heard that Dake contemplated going on this joy ride. The uncontradicted testimony is that Wells learned for the first time the following morning that Dake had taken the truck. Knowing nothing about the joy ride until the day after it occurred, how can it reasonably be contended that permission can be spelled out under this policy provision which requires "actual use," be with permission before the driver is entitled to be considered an additional insured.

There being no express permission for Dake to take the truck the authorities cited by appellees have no relevancy.

POINT B.

Appellees next argue, that there was an implied permission for Dake to use the truck. Although the authorities they cite, as pointed out above, all deal with the point of deviation after an express permission has been given. It would seem to be reasonable that implied permission might be shown in instances where the facts reveal a custom and practice existing over a period of time where the owner of a car with knowledge and without protest permitted another to make use of his car, if that use was the same as it was being used for at the time of the accident. Custom and practice would have to be for a use contemplated by the parties. There are no facts here to show any prior use of the truck by Dake out on a highway on a personal pleasure trip, much less on a drinking joy ride. Appellees on pages 2 and 3 of their brief refer to other occasions on which Dake used the truck, however these statements need some clarification. For instance, it is stated that Dake used the pick up truck to go fishing. It is to be noted, however, that Wells knew nothing about this. Dake apparently took the truck one evening and drove it a short distance up the highway to go fishing; Dake frankly stated that he took it without saying anything to Wells, T. 112, 113. Wells learned nothing

about this until the time of the trial. T. 164. The same thing is true respecting the use of the truck to drive to Timber for half a case of beer. In the first place, it should be pointed out this occurred during the prior year; Dake did this without any knowledge on the part of Wells and the evidence comes from Dake and is uncontradicted. T. 110, 111. And again, respecting the gasoline which Dake used in filling the tank of the pick up truck at the scene of the logging operations. This was done entirely without any knowledge of or consent from Wells. The only time that Dake used the truck with Wells' knowledge was a year earlier, at the time the crew were living and working on the other side of Round Top Mountain. At that time, Wells did let Dake use the truck on a few occasions to hunt in and around the logging operations but never to take it out on the highway and in so using the truck Dake may have purchased the gasoline. In addition to this, Dake testified that Wells, a year before this accident occurred, permitted him to take the truck in to Portland and bring back his wife and household furniture. Appellees state that Dake had driven the truck to Tillamook, however, the evidence shows that, if he did, Wells had no knowledge of it. T. 149, 164. Certainly there is nothing here that would make out a case of

implied permission. It was well known around the camp that Wells would not let anyone use this truck without his express permission. T. 181. The Supreme Court in the state court case, respecting this, states:

P. 588:

“Wells never allowed the men to use the truck without special permission, of which fact Dake was aware. Dake had never, to Wells’ knowledge, used the truck unless Wells told him to do so as a part of his work in and near the camp. Wells had given Dake special permission the previous summer to use the truck for a hunting trip over private roads only. Dake had not, to his knowledge used the truck for any such purpose since that time. Wells had no knowledge that Dake was going to take the truck on Sunday, the 28th, or that Dake was going to Tillamook on that date.”

POINT C.

Appellees make the point that the ruling of the trial court should be upheld on the theory that the trial court is entitled to draw different inferences from the evidence. The trouble with that contention is that there is no conflicting evidence. A court can not draw an arbitrary inference where there is no evidence to support it. In presenting the evidence, appellant has presented it in the most favorable light to the appellees. Dake was the only one who testified as to the use of the truck for the appellees and it is

Dake's testimony appellant relies upon for the proposition that there is no substantial evidence in the record to uphold the judgment of the lower court. This very same issue of whether Dake had any permission to take the truck and just what Dake was doing with the truck at the time of the accident, is set forth by the Oregon Supreme Court in its decision involving the same accident we are concerned with here, *Jasper v. Wells*, supra, p. 586,

"The admission that the car was owned by Wells established a prima facie case of agency under the decisions of this court, to which reference will later be made. Accordingly, the defendant went forward with the evidence and expressly denied that Dake was acting as his agent **or was authorized to take the car for any purpose.**" (Emphasis ours.)

And the court then points out that the evidence of both Wells and Dake stands without contradiction to the effect that Dake was not authorized directly or indirectly to take the truck on the day of the accident for any purpose. The court said, p. 588:

"The evidence given by the defendant Wells was direct, repeated, positive, without contradiction or impeachment and may be summarized as follows: Dake was in the general employ of Wells as a top loader in the camp. He was not in the employ of Wells on Sunday, the 28th day of June,

NOR WAS HE AUTHORIZED, DIRECTLY OR INDIRECTLY, TO TAKE THE TRUCK ON THAT DAY FOR ANY PURPOSE. Dake had no business of Wells to perform on that day. Wells never allowed the men to use the truck without special permission, of which fact Dake was aware. Dake had never, to Wells' knowledge, used the truck unless Wells told him to do so as a part of his work, in and near the camp. Wells had given Dake special permission the previous summer to use the truck for a hunting trip over private roads only. Dake had not, to his knowledge, used the truck for any such purpose since that time. Wells had no knowledge that Dake was going to take the truck on Sunday, the 28th, or that Dake was going to Tillamook on that date. Dake's testimony was to the same effect, namely, that he drove the truck without Wells' permission or knowledge. The trip to Tillamook was for his own pleasure. He had no purpose relating to Wells or to Wells' business in going on the trip. There is not a hint of conflicting testimony as to what Dake actually did or where or with whom he went." (Emphasis ours.)

In short, there is no conflicting evidence in this case from which an unfavorable inference could be drawn by the lower court. On the uncontradicted testimony of appellees' witness Dake, plaintiff here is entitled to a declaratory judgment in its favor.

There is an entire lack of any evidence of any custom or practice which would spell out any implied permission to use the truck to go out on a joy ride.

The New Jersey court, in considering the type of evidence required to show such an implied permission in *Penza v. Century Indemnity Company*, 197 A. 29, 30 states:

“There is no evidence of any such usage or practice here. It is all to the contrary. Hubert had never taken the car out without his employer’s specific permission, nor had he ever before used the car for his own purposes. The implied permission from Edwards, Sr., to Hubert, in view of the common practice that had theretofore existed between them, was that Hubert should return the automobile to the place provided for it by his employer, and that is what he did. As stated before, he parked the car in the rear of the boarding house and after about an hour, feeling better, instead of going to bed as he stated, he took the car from the place where it was parked for the night, and went out on a joy ride of his own, during which he ran into and injured the plaintiff. The hiatus or break which intervened between the parking of the car for the night and the subsequent unauthorized taking thereof by Hubert for his own purposes distinguishes, in our opinion this case from *Rikowski v. Fidelity & Casualty Co.*, 117 N.J.L. 407, 189 A. 102, 103, relied upon by the plaintiff.”

Also see *Denny v. Royal Indemnity Co.*, 159 N. E. 107, 20 Ohio App., 566, to the effect that if the master had no knowledge of deviation or wrongful use, he could not be held impliedly to have consented to such use. To the same effect is *Laroche v. Farm Bureau*

Mutual A. Ins. Co., (1939) 7 A. (2d) 361, 335 Pa. 478.

Appellees here seem to take the position that the fact Dake had permission from Sheldon to use the truck in the morning to go hunting (if Sheldon did not show up), would carry over and permit Dake after the hunting trip was completed, to start out again and use the truck on a joy ride. This is contrary to the authorities which stand unanimously for the proposition that where a person is given permission to use a car for a certain purpose and the car, after such use, is returned and such person thereafter re-takes the car to use it for another purpose then such person is excluded from coverage under the owners insurance policy. *Nicholas v. Independent Indemnity Co.*, N.J., 165 A. 868, 11 N.J. Misc., 344 stands for the proposition that the mere fact the driver of an automobile had rightful custody of the automobile for the purpose of storage would not give him the right to use the car for purposes not contemplated by the owner. In *Penza v. Century Indemnity*, (N.J.) 197 A. 29 it was held where chauffeur, who was permitted by borrower of automobile to take the automobile to chauffeur's boarding house, informed borrower he was going directly to boarding house and retire because he had a cold, automobile accident which occurred when chauffeur who had

not previously used automobile for his own pleasure, later in evening without borrower's knowledge took the automobile on a sight-seeing tour, was not covered by omnibus covering provision of automobile liability policy, since chauffeur did not have permission to use automobile at the time of the accident.

And in *Farnet v. DeCuers, La.* (1940) 195 So. 797, it was held that where a person given custody of an automobile to accomplish a certain purpose, and he puts the car away after completing such purpose, a subsequent retaking of the automobile by such bailee is deemed a new use for which a new consent must be given and in the absence of a new permission the bailee is not covered as an additional insured.

The Supreme Court of Oregon, in *Jasper v. Wells*, *supra*, points out that Dake's hunting trip had terminated and that there was a re-taking of the truck when he went joy riding: p. 589

"The hunting trip was ended and the car had been returned to the place from whence it had been taken before the fatal journey was begun. The trip to Tillamook in the afternoon was an entirely independent transaction having nothing to do with the hunting trip in the morning."

The so-called minority view which appellees cite in support of their argument that there was implied

permission for Dake to take the truck on the joy ride are of no help to him what ever as they deal only with situations where there was an original **express permission** not implied permission. Counsel for appellant has been unable to find a single authority which has held the driver to be covered under the additional insured clause under facts similar to those here. Moreover the re-taking of the truck by Dake distinguishes this case from every authority cited by appellees.

POINT D.

Appellees' brief, p. 15, contends that

"The law in Oregon is in harmony with the Dickinson, Ronan and Stovall cases." The so-called "minority rule."

These cases have already been discussed above and the later cases from those jurisdictions have been cited, which modify or over-rule the earlier decisions. In any event, those decisions relate solely to situations where there was an **original express permission** to use the car. Appellees cite for their statement that the Oregon law is in harmony with the small early minority authorities, the Oregon case of

Denny v. Oregon Automobile Ins. Co., 151 Ore. 42, 47 P. (2d) 245; 47 P. (2d) 946.

Putting aside for the moment that there is no evidence of any express permission here for Dake to use the truck, it will be observed from a reading of the Denny case that there was no question of permission involved. There was no question in that case of either express or implied permission under the additional insureds clause. The car was owned by the county and was being operated by a county official on county welfare work at the time of the accident. No one suggested that Judge Kennedy, the county official involved, was operating the car without permission of the county. It is a recognized fact in that case that he was operating the car with permission of the county and it was the express finding of fact by the jury that he was on county business at the time of the accident. He was on a mission concerning a woman and her children who were receiving aid from the county. In that case it was contended by the insurance company that by a warranty in the policy the automobile was to be used only by the health nurse. The actual warranty appears in the court's decision, p. 47: "The automobile described will be used by health nurse of Yamhill County." It appears from the decision that the work which Judge

Kennedy was doing at the time of the accident was of the nature generally looked after by the health nurse of Yamhill County. The court placed no construction on any question of permission or for that matter on the additional insureds clause at all, as will be seen from the court's language:

P. 53 "In the case at bar it is necessary to construe the entire policy of insurance to determine whether or not the insurance on the car was limited to the period of its use by the health nurse exclusively. The policy does not state that the car shall be used only by the health nurse."

P. 54 "It is contended by the appellant that if any effect whatever be given the 'additional assured' clause, it would render meaningless the clause in the policy relating to the health nurse, and that full effect can not be given to both of these provisions. It is true that the construction of the policy urged by appellant, to-wit: that the use of the car is limited solely to the health nurse, can not be given effect unless the 'additional assured' clause be entirely ignored."

And the Court did just that; it did not place any construction on the additional assured clause but simply ignored the additional assured's clause and constructed the warranty referred to above respecting the use of the car "by health nurse of Yamhill County," stating:

P. 54 "When the entire policy of insurance is construed, as indeed it must be, it is obvious that the interpretation contended for by the appellant is too narrow, and that the policy does cover use of the insured car by the legal representatives of Yamhill County, of whom Judge Kennedy was one."

On the other hand there is law in the State of Oregon which stands for the proposition that permission to use a car on former occasions does not carry with it any implication that it can be used at subsequent times. And also for the proposition that when permission has been given to use a certain car for a given purpose and an employee takes a different car for the same purpose but without permission, and becomes involved in an accident, that no permissive use can be spelled out against the employer.

The Court in *Jasper v. Wells*, *supra*, cites *Lehl v. Hull*, 152 Ore. 470, 53 P. (2d) 48, 54 P. (2d) 290, for the proposition that Dake had no permission to use the truck. In that case the adult son who had used his father's car on prior occasions, attempted to get permission by telephone, but could not reach his father, and took the car anyway; it holds the son was using the car without permission. The Court states in the *Jasper* case, p. 594, on this same subject:

"In the case of *Allum v. Ball*, *supra*, the owner of a truck directed one Clement to take a Chevrolet coupe and go for a chauffeur's license. Finding the coupe locked, Clement disengaged the trailer from a log truck and with another man drove off in the cab of the truck. This court said: 'We cannot agree with plaintiffs that Clement acted reasonably in taking the truck when the only **express permission** granted him referred to the coupe.' *Allum v. Ball* is in some respects a stronger case for the plaintiff than is the one at bar. In that case permission was given to use a car but not the car which was taken. In the case at bar there was no permission to use any car. Yet, in *Allum v. Ball* judgment for the plaintiff against the owner of the truck was reversed by this court." (Emphasis ours.)

Thus it will be seen that the applicable Oregon law relating to permission is exactly contrary to appellees contention. On the other hand it entirely supports appellants' position.

POINT E.

Specification IV.

Appellees claim the factual situation passed on by the Supreme Court is not *res adjudicata*, citing generally federal authorities from other jurisdictions. However, it is believed that we are controlled here by the Oregon Law. The Oregon law stands for the

proposition as shown in appellant's original brief, that every fact that was in issue or every fact that could have been put in issue is *res adjudicata* as to such facts, whether in the same action or a different action. And under what appellee refers to as the "familiar Erie decision" the Oregon law would apply.

In the trial of the state court action plaintiff, (appellee Jasper here) contended that Dake, in driving the truck to Tillamook, had implied permission from Wells to use it to go and see whether his "cousin Mike" might want a job working in the woods and of course if the evidence had sustained any implied authority for Dake to go to Tillamook in Wells' truck there would have been some inference that Dake was on Wells' business at the time and it would have been a question of fact possibly for the jury whether Dake was acting within the scope of his employment and with authority from Wells. If there had been any facts from which an inference of employment could be made out, such inference of employment would necessarily carry with it permission to take the truck. The Court in *Jasper v. Wells*, discusses this proposition at p. 590 and at p. 591 pointing out what burden plaintiff (appellee Jasper here) had in order to make out his case in the state court action: (p. 591)

“The plaintiff had a double burden, first, to show a permission to take the car, and, second, to show that it was being used in the business of the defendant Wells. If, as we think, the undisputed evidence discloses that Dake had no duties to perform at Tillamook, then it is doubly clear that he had no duty to perform for Wells on the trip north on the Coast Highway, on the beach at Twin Rocks, nor on the circuit over the Wolf Creek Highway at the scene of the accident.” (Emphasis ours.)

A reading of the Oregon Supreme Court decision will show that the court repeatedly states that Dake was not authorized to take the truck for any purpose and that he had no permission to use the truck; that he was performing no business for Wells; that he was not “authorized directly or indirectly to take the truck on that day for any purpose” and the court referring to what was in issue in that case states: p. 586

“Accordingly, the defendant went forward with the evidence and expressly denied that Dake was acting as his agent or was authorized to take the car for any purpose.”

P. 588:

“He was not in the employ of Wells on Sunday, the 28th of June, nor was he authorized, directly or indirectly, to take the truck on that day for any purpose.”

These facts having been passed on once they are conclusive against appellee Jasper. Appellant should not be required to relitigate them.

It is respectfully submitted that there is no evidence to support the judgment entered by the lower court and the same should be reversed with declaratory judgment entered in favor of appellant.

Respectfully submitted,

JAMES ARTHUR POWERS,
Attorney for Appellant.

8
78
No. 10584 10

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation,

Appellant,

vs.

UNION MUTUAL FIRE INSURANCE COM-
PANY OF PROVIDENCE, RHODE
ISLAND, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

DEC - 6 1943

PAUL P. O'BRIEN,
CLERK

No. 10584

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation,

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Transcript of Record

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for the Western District of Washington,
Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant

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Seattle, Washington

Attorneys for Appellee

MESSRS. BOGLE, BOGLE & GATES
603 Central Building
Seattle, Washington [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington,
for King County.

No. 33-31-31

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation,

Plaintiff,

v.

UNION MUTUAL FIRE INSURANCE COM-
PANY of Providence, Rhode Island, a corpo-
ration,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendant alleges:

I.

That the plaintiff now is and during all the times
hereinafter mentioned was a corporation duly incor-
porated under the laws of the State of Washington,
and has paid its license fee last due to the State of
Washington.

II.

That the defendant now is and during all the
times hereinafter mentioned was a corporation duly
incorporated under the laws of the State of Rhode
Island, and duly admitted to do business within
the State of Washington.

III.

That on or about the first day of January, 1940, the parties hereto entered into a mutual agreement in writing, of which the parts material to this complaint are as follows: [3]

“Between the Union Mutual Fire Insurance Company, of Providence, Rhode Island, hereinafter called the reinsuring company, and the Northwestern Mutual Fire Association, of Seattle, Washington, hereinafter called the reinsured company, issued effective January 1, 1940.

“Article I.

“Agreement to Cede and Accept Reinsurance. The reinsured company agrees to cede reinsurance to the reinsuring company and the reinsuring company agrees to accept reinsurance from the reinsured company on account of liability arising under policies, binders or entries of the reinsured company covering property located anywhere in the United States of America and/or the Dominion of Canada, subject to the following terms and conditions.

“Article II.

“Replaces Previous Agreement. This agreement is issued in lieu of and replaces the agreement between these companies which was issued effective January 1, 1931, and the terms of this agreement shall apply to all pro rata reinsurance between these companies regardless of date of issue, excepting reinsurance placed by the Union Mutual Fire Insurance Company with the Northwestern Mutual Fire Association.

“ARTICLE III.

“Terms and Rates To Be Specified. Reinsurance shall be for such lengths of time and at such rates of premium as shall be specified in binder notices, daily reports and certificates issued hereunder.

* * * * *

“Article V.

“Conditions Assumed by the Reinsured Company To Be Binding on the Reinsuring Company. The conditions of the reinsuring company’s reinsurance shall be identical with those of the reinsured company’s policies, and shall be subject to the same risks, conditions, valuations, endorsements, assignments, cancellations and transfers as are or may be assumed by the said reinsured company; provided, however, that the reinsuring company shall be promptly notified in writing of all changes of a reinsured policy of said reinsured company affecting title, location, amount, rate or term of risk.

“Article VI.

“Reinsuring Company Has Right to Decline and to Cancel. The reinsuring company has the right to cancel any reinsurance by written or telegraphic notice, in which [4] case liability shall terminate not later than noon of the 10th business day following the date of receipt of such notice by the reinsured company or upon the effective date of recession to any other company or companies, whichever event shall first occur; except that if the reinsured company shall begin the cancellation of its policy within the said ten business day period the reinsurance,

upon notice to the reinsuring company, shall continue until such policy cancellation is effected.

“Any request for cancellation of any risk or risks shall specify the insured’s name, city and state, to the extent that the reinsuring Company has received such information from the reinsured company.

“The reinsured company shall have the right to cancel any reinsurance by written or telegraphic notice and in the event of such cancellation the liability shall terminate upon the date specified in the notice.

“It is the intent of this article to provide for the cancellation of the individual cessions but if the reinsuring company demands cancellation of all the risks assumed, or all of any given classification, or all in any city, such cancellation period upon immediate request therefor by the reinsured company, shall be extended to thirty days; provided, however, such ten days notice shall be sufficient if there exists a delinquency in the payment of account or default in the performance of any obligation hereunder which has not been remedied by the reinsured company within ten days after specific notice of intention to cancel because of such delinquency or default.

“A request by the reinsuring company for a reduction of any cession shall be subject to the foregoing provisions applicable to requests for cancellation.”

“Article VII.

“Liability of Reinsuring Company; Entries, Accounts and Settlements of Reinsurance; How and

When Made. Reinsurance hereunder shall be ceded on the daily report and account current plan. The Effective time of each cession shall be that of the reinsured policy unless a later time be specified in the binding notice or reinsurance daily report. Liability shall be made effective by the specific written designation of the reinsuring company by the reinsured company. Reinsurance daily report or binding notice shall be mailed, telegraphed or given to the reinsuring company not later than the close of the next business day following the day of receipt of notice of its liability by the reinsured company; otherwise the reinsuring company shall not be liable upon such cession until such notice is mailed, telegraphed or given. [5]

“The reinsured company shall pay to the reinsuring company on each cession a pro rata share of all original premiums or additional premiums applicable to the policy reinsured and the reinsuring company shall refund a pro rata share of each return premium. Each pro rata share of additional or return premium or dividend on any individual transaction shall be waived if such share is less than 50c and where so waived no report is necessary. Cancellation by the reinsured company of a cession without cancellation of the policy of the reinsured company may be made at any time on a pro rata basis.

“An account current shall be rendered within fifteen days after the close of each month by the reinsured company and the balance thereunder shall

be paid by the debtor upon such account within sixty days after the close of the month to which such account applies.

“Article VIII.

“Kinds of Business Reinsured; Cessions Permitted. This agreement shall apply to any kind of insurance or reinsurance business written by the parties hereto, without limitation as to class, excepting excess and catastrophe reinsurance and excepting
No other exceptions

“Cessions hereunder shall in no case and at no time on one risk exceed \$25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company; except in specific cases subject to the approval of the reinsuring company; provided, (1) the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company; (2) the requirement for net retention will be deemed complied with if the reinsured company shall have its required amount of insurance (a) on building or buildings, (b) on the contents of the buildings, (c) on buildings and contents combined.

* * * * *

“Article XV.

“All Loss Adjustments by the Reinsured Company Binding on the Reinsuring Company. All loss settlements made by the reinsured company, whether

under strict policy conditions or by compromise or otherwise, shall be binding upon the reinsuring company, and the reinsuring company's proportion of the loss shall be payable to the reinsured company upon presentation of reasonable evidence of the amount paid by the reinsured company in settlement of the loss. [6]

"Whenever the pro rata share of loss and loss expense upon any loss shall be less than \$1.00, claim for such loss and expense shall be waived.

* * * * *

"Article XVII.

"Reinsuring Company Liable for Its Proportion of Adjustment Expenses. The reinsuring company shall be liable for its share of all expenses incurred by the reinsured company in connection with the investigation and settlement or contesting of the validity of claims or alleged losses, provided that no legal expenses shall be incurred without notice to and consent of the reinsuring company. The reinsuring company, if it elects so to do, may pay its proportion of any claim against the reinsured company should the reinsuring company prefer not to be a party to the legal test on the part of the reinsured company, and thereupon be discharged from any and all further liability on account of such claim. The reinsuring company shall be entitled to participate in any sums which may be received by the reinsured company, either as salvage or otherwise, except in cases of sums recovered where the reinsuring company may have elected not *be*

be a party with the reinsured company in incurring expenses in connection with such recovery.

* * * * *

“Article XIX.

“Right to Examine Records. The reinsuring company shall have the right to examine at the office of the reinsured company any books, documents, reports or records referring to the risks reinsured under this agreement, at any time while this agreement is in force or within twelve months after the termination of liability or the final settlement of all losses on such reinsurance.

* * * * *

“Article XXI.

“Termination of Agreement. This agreement is unlimited as to its duration, and may be terminated as to the further acceptance of reinsurance at any time by either party giving to the other party thirty days prior written notice of such termination.

“In case of notice of termination the reinsuring company shall continue to participate in all reinsurance coming within the terms of this agreement granted or renewed by the reinsured company during said thirty day period and the provisions of this agreement shall govern [7] all liability of one party to the other arising out of reinsurance ceded under this agreement until the final expiration or cancellation of such reinsurance and until the final settlement of all amounts due or payable by one party to the other.

“In Witness Whereof the parties hereto have caused these presents to be executed effective this 1st day of January, 1940.

NORTHWESTERN MUTUAL
FIRE ASSOCIATION

J. J. BEALL.

Vice-President.

L. D. BRILL.

Secretary.

UNION MUTUAL FIRE IN-
SURANCE COMPANY

C. A. MOSES.

Vice-Pres.

C. H. CADY.

Sec.”

IV.

During the year 1940 the Washington Toll Bridge Authority was constructing a single span suspension bridge across the Tacoma Narrows, said bridge being known as the Tacoma-Narrows Bridge, and in the early part of June, 1940, this plaintiff notified the defendant thereof, and requested that the defendant would inform the plaintiff how much it was prepared to accept from the plaintiff by way of reinsurance on the risk, and upon June 10, 1940, this plaintiff sent to the defendant a telegram in words and figures as follows:

“Seattle, Washington
June 10, 1940

“Union Mutual Fire Insurance Company
10 Weybosset Street
Providence, Rhode Island

“Please refer our letter May 31st Washington
Toll Bridge Authority-Tacoma Narrows Bridge.
Further information just received indicates
PML about 50%.

“We will retain \$50,000. Please wire your
authorization.

Northwestern Mutual Fire
Association” [8]

On June 11, 1940, the plaintiff received from the
defendant a telegram in words and figures as fol-
lows, to-wit:

“EAN 11 11 SER-WUX Providence RI
June 11 1940 1040 A

Northwestern Mutual Fire Assn-

Authorize \$50,000 Washington Toll Bridge
Authority Tacoma Narrows Bridge-

Union Mutual Fire Ins Co

C H Cady

827 AM”

Also on June 17 this plaintiff received from the
defendant a letter of which the following is a copy:

“Union Mutual Fire Insurance Company
Executive Offices, Grosvenor Building
Providence, Rhode Island

June 11, 1940

“Northwestern Mutual Fire Ass’n.

Third Ave. & Pine St.

Seattle, Washington

Washington Toll Bridge Authority

Gentlemen:

In reply to your telegram and in confirmation of ours of even date we authorize you to bind \$50,000. reinsurance of your company covering the above bridge. Kindly let us know the date you wish this authorization bound.

Very truly yours,

/sd/ C H Cady

Secretary”

CHC:MBC” [9]

V.

This plaintiff on or about the same time also received acceptances from other insurance companies of reinsurance similar to the reinsurance above mentioned, in the aggregate sum of \$250,000.00, so that in the latter part of June, 1940, this plaintiff had acceptance from the defendant and other insurance companies of reinsurance to that above specified in the aggregate sum of \$300,000.00, and relying upon the said acceptances of reinsurance of the defendant and other solvent insurance com-

panies this plaintiff executed and delivered to the Washington Toll Bridge Authority its Policy of insurance No. 614-3652, wherein it insured the said Washington Toll Bridge Authority against loss or damage by various risks therein specified upon the said Tacoma-Narrows Bridge and approaches (but excluding the administration building) in the sum of \$350,000.00, and thereafter sent to the said defendant its written notification that the plaintiff had ceded to the defendant \$50,000.00 of reinsurance upon the said policy of insurance in accordance with the defendant's authorization.

VI.

On November 7, 1940, the said insured property suffered considerable damage from a risk within the scope of the said policy, for which the said Washington Toll Bridge Authority made claim against this plaintiff to the full amount of the said policy as for a total loss, and this plaintiff thereafter did on August 21, 1941 in good faith pay to the said Washington Toll Bridge Authority in full compromise settlement of its [10] claim against this plaintiff the sum of \$269,230.78, of which the share which the defendant should reimburse is the sum of \$38,461.54. The plaintiff did on or about the 21st day of August, 1941, deliver to the said defendant proof of loss on account of the matters and things aforesaid in the sum of \$38,461.54, and demanded the said sum of money, but the said defendant has failed and refused to pay the said sum, or any part thereof.

VII.

This plaintiff, in investigating, adjusting and compromising the said loss and in defending the litigation carried on between this plaintiff and the said insured on account of the said loss, necessarily expended the sum of \$11,810.20 of which the defendant's share is \$1687.18, and the said defendant has not paid the said sum or any part thereof.

VIII.

The plaintiff has done and performed all acts and things required by the said Reinsurance Agreement necessary to be done and performed by it.

Wherefore, this plaintiff prays judgment against the said defendant in the sum of \$38,461.54 with interest thereon at the rate of 6% per annum from August 21, 1941 until paid, and upon \$1687.18, with interest thereon at the rate of 6% per annum from the date of service of this complaint until paid, and for costs of suit.

SHANK, BELT, RODE & COOK.

Attorneys for Plaintiff. [11]

State of Washington

County of King—ss:

L. D. Brill, being first duly sworn on oath deposes and says:

That he is Secretary of the Northwestern Mutual Fire Association, a corporation, plaintiff in the above entitled action, and that he makes this verification for and on behalf of said corporation, with full authority so to do; that he has read the fore-

going Complaint, knows the contents thereof, and believes the same to be true.

L. D. BRILL.

Subscribed and sworn to before me this 16th day of January, 1942.

[Seal] E. ROY GLOMSTAD

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed in County Clerk's Office King
County, Washington, Feb. 7, 1942. [12]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Superior Court of the State of
Washington for King County:

The petition of Union Mutual Fire Insurance Company, a corporation, defendant in the above entitled action, shows that heretofore and on or about January 17, 1942, the above-entitled action, which is an action of a civil nature, was brought in this court by the above named plaintiff against your petitioner as defendant. That your petitioner at the time of the commencement of said action was, ever since has been, and still is a foreign corporation, created by and existing under and by virtue of the laws of the State of Rhode Island, and a non-resident of the State of Washington. That the

plaintiff, Northwestern Mutual Fire Association, at the time of the commencement of said action was, ever since has been, and still is a corporation duly incorporated under the laws of the State of Washington. That said action is one of a civil nature in which there is a controversy wholly between citizens of different states, plaintiff being a citizen and resident of the State of Washington, and the defendant a citizen and resident of the State of Rhode Island.

That the amount in dispute in said action, exclusive of interest and costs, is the sum of \$38,461.54.

[13]

That in said action the plaintiff seeks to recover from the defendant on the ground and for the reason that the defendant has failed to perform its alleged obligation under a reinsurance contract entered into between the parties.

That said action is pending undetermined in this court and that the time has not yet arrived in which this defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington for the County of King, the court in which this action is brought, to answer or otherwise plead to the complaint of the plaintiff, and that no application has been made to any court or judge for the order to be applied for in this petition.

That your petitioner desires to remove this action before the trial thereof, and within thirty days from the date of the filing of this petition, into the District Court of the United States for the district in

which this action is pending, to-wit, the District Court of the United States for the Western District of Washington, Northern Division, and your petitioner makes and files with this petition a bond with good and sufficient surety thereon for its entering in said District Court of the United States within thirty days from the date of the filing of this petition, a copy of the record in this action, and for its paying all costs which may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if said District Court shall hold that this action was wrongfully or improperly removed thereto.

And your petitioner prays that said surety and said bond may be accepted and that this action may be removed into the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United [14] States in such cases made and provided, and that no further proceedings may be had herein in this court except the order to remove as required by law, and that your Honorable Court make an order approving said bond and an order for the removal of this action, and to that end your petitioner will ever pray.

BOGLE, BOGLE & GATES

Attorneys for Petitioner, Union
Mutual Fire Insurance Com-
pany.

to execute the within bond, as Surety, are held and firmly bound unto Northwestern Mutual Fire Association, a corporation, its successors and assigns, in the penal sum of Five Hundred Dollars (500.00) lawful money of the United States, for the payment of which sum well and truly to be made unto the said Northwestern Mutual Fire Insurance Association, a corporation, its successors and assigns, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

This bond is upon the condition, nevertheless, that

Whereas, said Union Mutual Fire Insurance Company, a corporation, the principal obligor herein and the defendant in the above-entitled action, has filed its petition in the above-entitled action in the Superior Court of the State of Washington for King County for the removal of a certain cause therein pending, wherein the said Northwestern Mutual Fire Association, a corporation, is [17] plaintiff, and the said Union Mutual Fire Insurance Company, a corporation, is defendant, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, therefore, if the said Union Mutual Fire Insurance Company, a corporation, shall enter in said District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the filing of the petition for the removal of said cause, a copy of the record in said action, and shall well and truly pay all costs that may be awarded by the said District Court of the United States for the Western Dis-

trict of Washington, Northern Division, if the said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

In witness whereof, said Union Mutual Fire Insurance Company, a corporation, as principal, and said Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, as surety, have caused this instrument to be executed by their proper officers thereunto duly authorized this 6 day of February, 1942.

UNION MUTUAL FIRE INSURANCE COMPANY, a corporation,

By BOGLE, BOGLE & GATES

Principal.

Its Attorneys.

SAINT PAUL-MERCURY INDEMNITY COMPANY OF SAINT PAUL, a corporation,

By CASSIUS E. GATES

Its Attorney-in-Fact.

[Endorsed]: Copy hereof received this Feb. 6, 1942.

SHANK, BELT, RODE & COOK
Surety.

[Endorsed]: Filed in County Clerk's Office, King County, Washington Feb. 6, 1942. [18]

[Title of Superior Court and Cause.]

NOTICE OF PETITION AND BOND
FOR REMOVAL.

To: Northwestern Mutual Fire Association, a corporation, the Plaintiff above named, and to Shank, Belt, Rode & Cook, its attorneys:

You and each of you will please take notice that the defendant Union Mutual Fire Insurance Company, a corporation, will file in the above entitled court and action on February 6, 1942, its petition and bond for the removal of said action from the above entitled court to the District Court of the United States for the Western District of Washington, Northern Division, a copy of which said petition and bond are attached hereto, and that on February 9, 1942 at 9:30 o'clock A. M., or as soon thereafter as counsel may be heard, said defendant will apply to the above entitled court at the court room of the presiding judge thereof in the County Court House of King County, being the County-City Building in Seattle, Washington, for an order of removal as prayed for in said petition.

BOGLE, BOGLE & GATES
Attorneys for Defendant.

[Endorsed]: Copy hereof received this Feb. 6, 1942.

SHANK, BELT, RODE & COOK

[Endorsed]: Filed in County Clerk's Office King County, Washington Feb. 6, 1942. [19]

[Title of Superior Court and Cause.]

ORDER ON REMOVAL.

At this time comes the defendant above named, Union Mutual Fire Insurance Company, a corporation, and presents a petition asking for the removal of the above entitled action from the Superior Court of the State of Washington for King County to the District Court of the United States for the Western District of Washington, Northern Division, which petition sets forth the reason for said removal, to-wit:

That this action is of a civil nature, and that the amount in dispute, exclusive of interests and costs, is the sum of \$38,461.54; that the controversy in this action is between citizens of different states, plaintiff being a citizen and resident of the State of Washington, and defendant being a citizen and resident of the State of Rhode Island.

And it appearing from said petition that said action is pending undetermined in this court and that the time has not yet arrived at which this defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington for King County, the Court in which this action is brought, to answer or plead to the complaint of the plaintiff, and that no application has previously been made to any Court or judge [20] for the order applied for in said petition, and it further appearing to this Court that said Union Mutual Fire Insurance Company, a corporation, has presented a bond to this Court as provided by law, and it further appearing to this

Court that said bond and petition are sufficient to authorize the removal of said action to the District Court of the United States for the Western District of Washington, Northern Division;

Now, Therefore, It Is Hereby Considered, Ordered and Adjudged That said bond be, and it is hereby, accepted and approved, and that this Court proceed no further in this action, and that the same be, and it is hereby transferred to the District Court of the United States for the Western District of Washington, Northern Division, and that the clerk of this Court prepare and file a complete copy of the records of this Court in the above entitled action and certify to the same as a copy of said record, and forward the same to the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, in the County of King, and State of Washington, within thirty days from the filing of the petition herein.

Dated at Seattle, Washington, in open court, this 9th day of February, 1942.

CLAY ALLEN

Judge.

Presented by:

CHARLES F. OSBORN

Of Bogle, Bogle & Gates

Attorneys for Defendant.

[Endorsed]: Copy hereof received this Feb. 6, 1942.

SHANK, BELT, RODE & COOK

[Endorsed]: Filed in County Clerk's Office, King County, Washington Feb. 9, 1942. [21]

[Title of Superior Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD
ON REMOVAL.

To the Clerk of the Above Entitled Court:

Union Mutual Fire Insurance Company, a corporation, the defendant above named, appearing specially herein and not otherwise, hereby requests that you forthwith prepare and certify a true and correct copy of the record in the above entitled action for transmission to the United States District Court for the Western District of Washington, Northern Division, within thirty (30) days from February 9, 1942, the date of the entry of the order on removal herein; said copy of the record to include all the files, pleadings, affidavits, bonds and orders herein.

Dated this 17 day of February, 1942.

BOGLE, BOGLE & GATES

Attorneys for defendant Union Mutual Fire Insurance Company, a corporation, appearing specially herein and not otherwise.

[Endorsed]: Filed in County Clerk's Office, King County, Washington Feb. 17, 1942. [22]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD IN SUPERIOR COURT.

State of Washington,
County of King—ss.

I, Carroll Carter, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington in and for King County, do hereby certify that the foregoing is a full, true and correct transcript of the entire and complete record and files, including full, true and correct copies of journal and minute entries not substantially embodied in said files, in Cause No. 333131, entitled Northwestern Mutual Fire Association, a corporation, vs. Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation, as the same now appear on file and record in said cause in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the Superior Court this 27 day of February A. D., 1942.

[Seal] CARROLL CARTER,
County Clerk.

By /s/ RALPH C. PACKHURST
Deputy Clerk [23]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 480

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation

Plaintiff,

vs.

UNION MUTUAL FIRE INSURANCE COM-
PANY of Providence, Rhode Island, a corpora-
tion,

Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff and in accordance with
the order of this Court, and for cause of action
against the defendant, alleges:

I.

That the plaintiff now is and during all the times
hereinafter mentioned was a corporation duly in-
corporated under the laws of the State of Wash-
ington, and has paid its license fee last due to the
State of Washington.

II.

That the defendant now is and during all the
times hereinafter mentioned was a corporation duly
incorporated under the laws of the State of Rhode
Island, and duly admitted to do business within the
State of Washington.

III.

That on or about the first day of January, 1940, the parties hereto entered into a mutual agreement in writing, of which the following is a copy:

“REINSURANCE AGREEMENT

“Between the Union Mutual Fire Insurance Company, of Providence, Rhode Island, hereinafter called the reinsuring company, and the Northwestern Mutual Fire Association, of Seattle, Washington, hereinafter called [24] the reinsured company, issued effective January 1, 1940.

“Article I.

“Agreement to Cede and Accept Reinsurance. The reinsured company agrees to cede reinsurance to the reinsuring company and the reinsuring company agrees to accept reinsurance from the reinsured company on account of liability arising under policies, binders or entries of the reinsured company covering property located anywhere in the United States of America and/or the Dominion of Canada, subject to the following terms and conditions.

“Article II.

“Replaces Previous Agreement. This agreement is issued in lieu of and replaces the agreement between these companies which was issued effective January 1, 1931, and the terms of this agreement shall apply to all pro rata reinsurance between these companies regardless of the date of issue, excepting reinsurance placed by the Union Mutual Fire Insurance Company with the Northwestern Mutual Fire Association.

“Article III.

“Terms and Rates to Be Specified. Reinsurance shall be for such lengths of time and at such rates of premium as shall be specified in binder notices, daily reports and certificates issued hereunder.

“Article IV.

“Reinsurance To Be Void In Certain Contingencies. It is expressly understood and agreed that any reinsurance ceded hereunder shall be null and void if there exists, at the time of ceding at the office of the reinsured company having charge of the placing of [25] reinsurance, any knowledge of fire or other hazard affecting or threatening the risk to be reinsured, subject to modifications contained in Article IX of this agreement.

“Article V.

“Conditions Assumed By the Reinsured Company To Be Binding On the Reinsuring Company. The conditions of the reinsuring company’s reinsurance shall be identical with those of the reinsured company’s policies, and shall be subject to the same risks, conditions, valuations, endorsements, assignments, cancellations and transfers as are or may be assumed by the said reinsured company; provided, however, that the reinsuring company shall be promptly notified in writing of all changes of a reinsured policy of said reinsured company affecting title, location, amount, rate or term of risk.

“Article VI.

“Reinsuring Company Has Right To Decline and To Cancel. The reinsuring company has the right

to cancel any reinsurance by written or telegraphic notice, in which case liability shall terminate not later than noon on the 10th business day following the date of receipt of such notice by the reinsured company or upon the effective date of recession to any other company or companies, whichever event shall first occur; except that if the reinsured company shall begin the cancellation of its policy within the said ten business day period the reinsurance, upon notice to the reinsuring company, shall continue until such policy cancellation is effected. [26]

“Any request for cancellation of any risk or risks shall specify the insured’s name, city and state, to the extent that the reinsuring company has received such information from the reinsured company.

“The reinsured company shall have the right to cancel any reinsurance by written or telegraphic notice and in the event of such cancellation the liability shall terminate upon the date specified in the notice.

“It is the intent of this article to provide for the cancellation of the individual cessions but if the reinsuring company demands cancellation of all the risks assumed, or all of any given classification, or all in any city, such cancellation period upon immediate request therefor by the reinsured company, shall be extended to thirty days; provided, however, such ten days notice shall be sufficient if there exists a delinquency in the payment of account or default in the performance of any obligation hereunder which has not been remedied by the reinsured com-

pany within ten days after specific notice of intention to cancel because of such delinquency or default.

“A request by the reinsuring company for a reduction of any cession shall be subject to the foregoing provisions applicable to requests for cancellation.

“Article VII.

“Liability of Reinsuring Company; Entries, accounts and Settlements of Reinsurance; How and When Made. Reinsurance hereunder shall be ceded on the daily report and account current plan. The effective time of each cession shall be that of the reinsured policy unless a later time be specified in the binding notice [27] or reinsurance daily report. Liability shall be made effective by the specific written designation of the reinsuring company by the reinsured company. Reinsurance daily report or binding notice shall be mailed, telegraphed or given to the reinsuring company not later than the close of the next business day following the day of receipt of notice of its liability by the reinsured company; otherwise the reinsuring company shall not be liable upon such cession until such notice is mailed, telegraphed or given.

“The reinsured company shall pay to the reinsuring company on each cession a pro rata share of all original premiums or additional premiums applicable to the policy reinsured and the reinsuring company shall refund a pro rata share of each return premium. Each pro rata share of additional or return premium or dividend on any individual transaction shall be waived if such share is less than 50 cents

and where so waived no report is necessary. Cancellation by the reinsured company of a cession without cancellation of the policy of the reinsured company may be made at any time on a pro rata basis.

“An account current shall be rendered within fifteen days after the close of each month by the reinsured company and the balance thereunder shall be paid by the debtor upon such account within sixty days after the close of the month to which such account applies.

“Article VIII.

“Kinds of Business Reinsured; Cessions Permitted. This agreement shall apply to any kind of [28] insurance or reinsurance business written by the parties hereto, without limitation as to class, excepting excess and catastrophe reinsurance and excepting—No other exceptions—.

“Cessions hereunder shall in no case and at no time on one risk exceed \$25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company; except in specific cases subject to the approval of the reinsuring company; provided, (1) the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company; (2) the requirement for net retention will be deemed complied with if the reinsured company shall have its required amount of insurance (a) on building or buildings, (b) on the contents of the buildings, (c) on buildings and contents combined.

“Article IX.

(Article IX omitted for the reason that the same is marked “Void.”)

“Article X.

“Liability of the Reinsuring Company to Continue Beyond Expiration. The reinsuring company agrees to continue liability under any binder, certificate or entry ceded hereunder for a period of 30 days following the expiration of such binder, certificate or entry, provided:

“(1) The policy, certificate, or entry of the reinsured company, reinsured by such binder, certificate or entry, is continued beyond expiration either by [29] renewal or binder,

“(2) The reinsuring company has not received notice that reinsurance is no longer required, prior to the expiration of the said 30 days.

“(3) This liability is to be for an amount not exceeding the amount named in the original binder, certificate or entry, and

“(4) Should the policy, certificate or entry reinsured be renewed for a less amount, the liability of the reinsuring company shall be renewed in the same proportion as under the original entry.

“Article XI.

“Rates; Allowances for Expenses. The rates upon which this contract is based and upon which premiums hereinafter are to be computed shall be as follows:

“Reinsurance hereunder shall be ceded at the same rates as are charged on the policies reinsured.

"This agreement is subject to Plan "C" following:

"Plan 'A': The reinsured company shall receive in its monthly accounts an allowance of ...% of premiums ceded and shall make return allowance at the same rate on any return premiums. The reinsuring company shall also allow the reinsured company by way of reimbursement of the reinsured company's 'dividend' or 'saving' to policyholders an amount equal to ...% on all reinsurance premiums earned which shall become payable at the termination of each cession, and shall be accepted by the reinsured company as full settlement of all claims for dividend or unabsorbed premium returns; such allowance, however, shall be applicable only to [30] policies on which the reinsured company shall pay a 'dividend.'

"Plan 'B': The reinsured company shall receive in its monthly accounts an allowance of ...% of premiums ceded and shall make return allowance at the same rate on any return premiums. The reinsuring company shall also allow and pay the reinsured company by way of reimbursement of the reinsured company's 'dividend' or 'saving' to policyholders an amount equal to ...% of the net premiums ceded by the reinsured company during the same month of the preceding year which shall be settled and paid upon the entry thereof in each month's account current. A return payment at the same rate shall be applicable to any excess of return premiums over premiums.

“Plan ‘C’: The reinsuring company shall allow the reinsured company an amount equal to 52½% of the reinsurance premiums hereunder and the reinsured company shall make a return allowance at the same rate on all return premiums. Such allowance shall cover both commissions and dividends, and shall be in lieu of reimbursement for taxes, rating, and audit bureau fees.

“Article XII.

(Article XII omitted for the reason that the same is marked “Void.”)

“Article XIII.

“Reporting Losses. All losses which may occur on reinsurance ceded under this agreement shall be reported to the reinsuring company as soon as possible after advice thereof has been received by the reinsured company. Such reports shall give the estimated proper- [31] tion of the reinsuring company’s loss.

“Article XIV.

“Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with.

“Article XV.

“All Loss Adjustments by the Reinsured Company Binding on the Reinsuring Company. All loss settlements made by the reinsured company, whether under strict policy conditions or by compromise or otherwise, shall be binding upon the reinsuring company, and the reinsuring company's proportion of the loss shall be payable to the reinsured company upon presentation of reasonable evidence of the amount paid by the reinsured company in settlement of the loss.

“Whenever the pro rata share of loss and loss expense upon any loss shall be less than \$1.00, claim for such loss and expense shall be waived.

“Article XVI.

“Insolvency of the Reinsured Company. In the event of the insolvency of the reinsured company, any claim for reinsurance hereunder shall be payable to the liquidator or receiver of the reinsured company [32] on the basis of the claim or claims allowed against the insolvent reinsured company by any court of competent jurisdiction or any justice or judge thereof, or by an receiver having authority to determine and allow such claims.

“Article XVII.

“Reinsuring Company Liable for Its Proportion of Adjustment Expenses. The reinsuring company shall be liable for its share of all expenses incurred by the reinsured company in connection with the investigation and settlement or contesting of the validity of claims or alleged losses, provided that no legal expenses shall be incurred without notice

to and consent of the reinsuring company. The reinsuring company, if it elects so to do, may pay its proportion of any claim against the reinsured company should the reinsuring company prefer not to be a party to the legal test on the part of the reinsured company, and thereupon be discharged from any and all further liability on account of such claim. The reinsuring company shall be entitled to participate in any sums which may be received by the reinsured company, either as salvage or otherwise, except in cases of sums recovered where the reinsuring company may have elected not to be a party with the reinsured company in incurring expenses in connection with such recovery.

“Article XVIII.

“Assessment Liability. The reinsured company shall not be a member of or be subject to the By-Laws of the reinsuring company or be subject to any liability for assessment. [33]

“Article XIX.

“Right to Examine Records. The reinsuring company shall have the right to examine at the office of the reinsured company any books, documents, reports or records referring to the risks reinsured under this agreement, at any time while this agreement is in force or within twelve months after the termination of liability or the final settlement of all losses on such reinsurance.

“Article XX.

“Arbitration. In case of any dispute arising be-

tween the parties hereto with respect to any transaction under this agreement, either company may request in writing that the dispute be referred to arbitration. Thereupon each company shall name an arbitrator, who must be an executive officer of a fire insurance company who is not an officer or director of either party to this agreement. These two arbitrators shall choose an umpire before entering upon arbitration, and shall forthwith notify the contracting parties of such choice of umpire.

“If the two arbitrators fail to agree upon an umpire within thirty days of their appointment, new arbitrators shall be appointed in conformity with this article.

“Each party shall submit its case within 30 days of notice of the selection of the umpire. The arbitrators and the umpire shall be relieved from all judicial formalities and shall interpret the present agreement as an honorable engagement. Their decision, or that of a majority of them, shall be final and binding upon the parties hereto. The arbitrators shall [34] give their award in writing at the earliest convenient date, but not later than sixty days from the end of the thirty day period provided for the submission of the case by the companies.

“The cost of arbitration and the award shall be at the discretion of the arbitrators or of one arbitrator and the umpire, as the case may be, who may direct to and by whom and in what manner same shall be paid.

“Article XXI.

“Termination of Agreement. This agreement is

unlimited as to its duration, and may be terminated as to the further acceptance of reinsurance at any time by either party giving to the other party thirty days prior written notice of such termination.

“In case of notice of termination the reinsuring company shall continue to participate in all reinsurance coming within the terms of this agreement, granted or renewed by the reinsured company during said thirty day period and the provisions of this agreement shall govern all liability of one party to the other arising out of reinsurance ceded under this agreement until the final expiration or cancellation of such reinsurance nad until the final settlement of all amounts due or payable by one party to the other.

“In Witness Whereof the parties hereto have caused these presents to be executed effective this first day of January, 1940.

“NORTHWESTERN MUTUAL
FIRE ASSOCIATION

“UNION MUTUAL FIRE IN-
SURANCE COMPANY [35]

“J. J. BEALL (Signed)

Vice-President

“L. D. BRILL (Signed)

Secretary

“C. A. MOSES (Signed)

Vice-President

“C. H. CADY (Signed)

Sec.

IV.

During the year 1940 the Washintgon Toll Bridge Authority was constructing a single span suspension bridge across the Tacoma Narrows, said bridge being known as the Tacoma-Narrows Bridge, and in the early part of June, 1940, this plaintiff notified the defendant thereof, and requested that the defendant would inform the plaintiff how much it was prepared to accept from the plaintiff by way of reinsurance on the risk, and upon June 10, 1940, this plaintiff sent to the defendant a telegram in words and figures as follows:

“Seattle, Washington
June 10, 1940

“Union Mutual Fire Insurance Company
10 Weybosset Street
Providence, Rhode Island

“Please refer our letter May 31st Washington Toll Bridge Authority - Tacoma Narrows Bridge. Further information just received indicates PML about 50%.

“We will retain \$50,000. Please wire your authorization.

Northwestern Mutual Fire Association”

On June 11, 1940, the plaintiff received from the defendant a telegram in words and figures as follows, to-wit:

“EAN 11 11 SER-WUX Providence RI
June 11 1940 1040 A
Northwestern Mutual Fire Assn.

Authorize \$50,000 Washington Toll Bridge
Authority Tacoma Narrows Bridge.

Union Mutual Fire Ins Co C H CADY
827 AM" [36]

Also on June 17 this plaintiff received from the
defendant a letter of which the following is a copy:

"Union Mutual Fire Insurance Company
Executive Offices, Grosvenor Building
Providence, Rhode Island

June 11, 1940

"Northwestern Mutual Fire Ass'n.

Third Ave. & Pine St.

Seattle, Washington

Washington Toll Bridge Authority

Gentlemen:

"In reply to your telegram and in confirma-
tion of ours of even date we authorize you to
bind \$50,000. reinsurance of your company cov-
ering the above bridge. Kindly let us know the
date you wish this authorization bound.

"Very truly yours,

"/sd/ C H CADY
Secretary"

CHC:MBC"

V.

This plaintiff on or about the same time also re-
ceived acceptances from other insurance companies
of reinsurance similar to the reinsurance above
mentioned, in the aggregate sum of \$250,000.00, so

that in the latter part of June, 1940, this plaintiff had acceptance from the defendant and other insurance companies of reinsurance to that above specified in the aggregate sum of \$300,000.00, and relying upon the said acceptances of reinsurance of the defendant and other solvent insurance companies [37] this plaintiff executed and delivered to the Washington Toll Bridge Authority its Policy of insurance No. 614-3652, wherein it insured the said Washington Toll Bridge Authority against loss or damage by various risks therein specified upon the said Tacoma-Narrows Bridge and approaches (but excluding the administration building) in the sum of \$350,000.00, and thereafter sent to the said defendant its written notification that the plaintiff had ceded to the defendant \$50,000.00 of reinsurance upon the said policy of insurance in accordance with the defendant's authorization.

VI.

On November 7, 1940, the said insured property suffered considerable damage from a risk within the scope of the said policy, for which the said Washington Toll Bridge Authority made claim against this plaintiff to the full amount of the said policy as for a total loss, and this plaintiff thereafter did on August 21, 1941 in good faith pay to the said Washington Toll Bridge Authority in full compromise settlement of its claim against this plaintiff the sum of \$269,230.78, of which the share which the defendant should reimburse is the sum of \$38,461.54. The plaintiff did on or about the

21st day of August, 1941, deliver to the said defendant proof of loss on account of the matters and things aforesaid in the sum of \$38,461.54, and demanded the said sum of money, but the said defendant has failed and refused to pay the said sum, or any part thereof.

VII.

This plaintiff, in investigating, adjusting and compromising the said loss and in defending the litigation carried on between this plaintiff and the said insured on account of the said loss, necessarily expended the sum of \$11,810.20 of which the defendant's share is \$1687.18, and the said defendant has [38] not paid the said sum or any part thereof.

VIII.

That upon December 29, 1941, the plaintiff, through its duly authorized counsel, sent through the mail a letter addressed to the defendant, of which the following is a copy:

“December 29, 1941.

“Union Mutual Fire Insurance Company,
Grovesnor Building,
Providence, Rhode Island.

“Attention: R. P. Swan,
Assistant Vice President.

“Gentlemen:

“In re: The Washington Toll Bridge
Authority Loss—November 7, 1940.

“The Northwestern Mutual Fire Association

has turned over to us for handling the claim which they have against you for loss on the Tacoma-Narrows Bridge in the principal sum of \$38,461.54, on account of your Reinsurance Agreement. We have read the correspondence which has passed between you and Mr. J. J. Beall, Executive Vice President of the Association, and we fully agree upon his stand to the effect that they were clearly empowered under the terms of the Reinsurance Agreement existing between you to consider that this reinsurance involved not more than \$25,000 on a single risk. I therefore see no necessity of repeating his argument upon this point.

“However, we note in Article VIII of the Reinsurance Agreement that the limit of each risk is expressly subject to the exception of ‘specific cases subject to the approval of the reinsuring company.’ The files in this case disclose that the Association on May 31, 1940, sent to each of their various reinsurers, among which was [39] your company, a circular specifically describing this bridge as a single span suspension bridge. They received numerous specific authorizations from various reinsurers, but not having received any from you, on June 10, 1940, they sent a telegram to you, in which they asked that you ‘please wire your authorization.’ You replied to this telegram by a specific authorization of \$50,000.00, following it up by a letter of confirmation. In reliance upon

your specific authorization, and the other authorizations which they had received, the Association issued its policy dated July 1, 1940, in the sum of \$350,000.00, which they would most certainly not have done if they had not considered that an aggregate of their reinsurance authorizations, including your authorization of \$50,000.00, amounted to the full sum of \$300,000.00.

“We would therefore earnestly urge upon you their cession to you of \$50,000.00 reinsurance clearly comes within the exceptions of a specific case subject to your approval.

“We note that Article XX provides that either party may obtain arbitration upon this dispute. We would therefore ask if you desire to arbitrate this dispute. Please inform us at your early convenience.

“Yours very truly,

SHANK, BELT, RODE &
COOK,

By H. C. BELT (Sd)”

That thereafter on or about the sixth day of January, 1942, the said defendant answered the said letter by sending through the mail a letter addressed

to the duly authorized coun- [40] sel of the plaintiff, of which the following is a copy:

“January 6, 1941

“Air Mail

Mr. H. C. Belt

Shank, Belt, Rode & Cook

1401 Joseph Vance Building

Seattle, Washington

“The Washington Toll Bridge Authority Loss—November 7, 1940

“Dear Mr. Belt:

“With reference to your letter of December 29, regarding the Northwestern Mutual Fire Association’s claim in connection with the above loss, we have not at any time questioned the points which you mention, but have only questioned the Northwestern Mutual’s actual net retention on the risk as compared to their declared net line as indicated on the reinsurance certificate.

“We are not requesting arbitration of this matter but if the Northwestern Mutual desires to institute arbitration proceedings in accordance with the contract terms, we would ask that they notify us to this effect in order that proper steps may be taken.

“Very truly yours,

Union Mutual Fire Insurance
Company

(Signed) R. P. SWAN

Asst. Vice President”

That in and by the letters above mentioned, the said defendant waived the right to submit to arbitration the matters and things set out in the complaint herein. [41]

IX.

The plaintiff has done and performed all acts and things required by the said Reinsurance Agreement necessary to be done and performed by it.

Wherefore, this plaintiff prays judgment against the said defendant in the sum of \$38,461.54 with interest thereon at the rate of 6 per cent per annum from August 21, 1941 until paid, and upon \$1687.18, with interest thereon at the rate of 6 per cent per annum from the date of service of this complaint until paid, and for costs of suit.

JO D. COOK

SHANK, BELT, RODE & COOK

Attorneys for Plaintiff.

Copy Received April 10, 1942.

BOGLE, BOGLE & GATES

[Endorsed]: Filed April 11, 1942. [42]

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR
ADMISSIONS UNDER RULE 36

The defendant herein, Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation, hereby requests the plaintiff herein, Northwestern Mutual Fire Association, a corporation, to

make the following admissions herein under Rule 36 of the Rules of Civil Procedure for the District Courts of the United States for the purpose of this action only and subject to all pertinent objections as to relevancy and materiality which may be interposed at the trial:

* *

14. On or about October 15, 1941, Mr. H. D. Heath, Assistant Secretary of Northwestern Mutual Fire Association, transmitted a letter from Seattle to Union Mutual Fire Insurance Company at Providence, in the form of Exhibit "13", which is hereto attached and by reference made a part hereof as though fully set forth herein.

* *

19. On or about December 29, 1941, Messrs. Shank, Belt, Rode & Cook transmitted a letter from Seattle to the Union Mutual Fire Insurance Company at Providence, in the form of Exhibit "18", which is hereto attached and by reference made a part hereof as though fully set forth herein.

* *

21. Each of the documents attached to and exhibited with [43] this request is genuine. [44]

EXHIBIT 13

copy letterhead of
Northwestern Mutual Fire Association
Northwestern Mutual Insurance Building
Pine at Third—Seattle

October 15, 1941.

Fire & Inland Marine
Claim Department

G. H. Thompson, Vice President
H. D. Heath, Assistant Secretary
Air Mail

Union Mutual Fire Insurance Company
Grosvenor Building
Providence, R. I.

Attention: Mr. R. P. Swan

Gentlemen:

—Washington Toll Bridge Authority
Loss November 7, 1940—

This loss has given rise to a number of unusual problems and the point raised in your letters of September 8 and October 10 are no less interesting than some of the questions that presented themselves to us in the actual adjustment of the loss. We are quite open-minded on the subject and can understand your position, yet at the same time we find it difficult to accept your reasoning as correct.

At no time has the Northwestern ever taken its excess contracts into consideration in establishing

net lines for reinsurance purposes. When we speak of our net line on a risk, we do so only in the sense of our net after all specific reinsurance is deducted. In the ordinary case, of course, the question would never arise in any event since the amount we would retain net on one risk would be considerably less than the \$30,000 limit in our excess catastrophe contract. Generally speaking, we believe that would be true of all companies, since they all carry some form of excess protection and so far as we know, none take their excess reinsurance into consideration in determining their net retentions. We ceded to you \$50,000 on your specific authorization, and it is our conscientious opinion that your payment should be predicated on that amount and should not be influenced by the existence of our catastrophe excess contract.

Even if we were to accept your contention as correct, we still cannot agree that you have used the proper method of calculating your payment. We call attention to Article XIV of our Reinsurance Agreement which reads as follows:

Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the pro-

vision for net retention provided for in Article VIII been complied with." [45]

If your payment were to be adjusted in accordance with the above provision in the contract, it would result in an upward revision in our final net loss and a similar downward revision in your proportion, as follows:

Northwestern's net	\$38,461.54	Union Mutual	
		Proportion	38,461.54
Excess contribution	7,615.39		
Final N.W. net	\$30,846.15		
Add 1/2 of excess	3,807.70	Deduct 1/2 of excess	3,807.70
Adjusted N.W. net	\$34,652.85		
		Adjust Union Mutual Proportion	\$34,653.84

As I have already indicated, it is not our wish to take an arbitrary stand on the question of whether or not there should be an adjustment. In view of the usualness of the situation, we are open-minded on it, although at the same time we hope you see our position. Before consideration can be given to that question, however, it would seem necessary to first decide how the adjustment, if any, should be made. We would appreciate it if you would review our figures in the light of the contract and let us know if you do not agree. We shall look forward with interest to your reply.

Yours very truly,

(Sgd) H. D. HEATH,
Assistant Secretary.

HDH:ho [46]

EXHIBIT 18

copy letterhead of
Law Offices
Shank, Belt, Rode & Cook
Suite 1401 Joseph Vance
Building
Seattle

Corwin S. Shank

Cable Address

Horatio C. Belt

“Shankwin

Alfred Rode

Jo Dudley Cook

Corwin P. Shank

Carl J. Watkins

December 29, 1941.

Union Mutual Fire Insurance Company
Grovesnor Building
Providence, Rhode Island.

Attention: R. P. Swan, Assistant Vice President.

Gentlemen:

In Re: The Washington Toll Bridge
Authority Loss—
November 7, 1940.

The Northwestern Mutual Fire Association has turned over to us for handling the claim which they have against you for loss on the Tacoma-Narrows Bridge in the principal sum of \$38,461.54, on account of your Reinsurance Agreement. We have read the correspondence which has passed between you and Mr. J. J. Beall, Executive Vice President of the Association, and we fully agree upon his

stand to the effect that they were clearly empowered under the terms of the Reinsurance Agreement existing between you to consider that this reinsurance involved not more than \$25,000 on a single risk. I therefore see no necessity of repeating his argument upon upon this point.

However, we note in Article VIII of the Reinsurance Agreement that the limit of each risk is expressly subject to the exception of "specific cases subject to the approval of the reinsuring company". The files in this case disclose that the Association on May 31, 1940 sent to each of their various reinsurers, among which was your company, a circular specifically describing this bridge as a single span suspension bridge. They received numerous specific authorizations from various reinsurers, but not having received any from you, on June 10, 1940 they sent a telegram to you, in which they asked that you "please wire your authorization". You replied to this telegram by a specific authorization of \$50,000.00, following it up by a letter of confirmation. In reliance upon your specification authorization, and the other authorizations which they had received, the Association issued its policy dated July 1, 1940, in the sum of \$350,000.00, which they would most certainly not have done if they had not considered that an aggregate of their reinsurance authorizations, including your authorization of \$50,000.00, amounted to the full sum of \$300,000.00.

We would therefore earnestly urge upon you their cession to you of \$50,000.00 reinsurance clearly

comes within the exceptions of a specific case subject to your approval.

We note that Article XX provides that either party may obtain arbitration upon this dispute. We would therefore ask if you desire to arbitrate this dispute. Please inform us at your early convenience.

Yours very truly,

SHANK, BELT, RODE &
COOK.

By H. C. BELT.

HCB:wm

[Endorsed]: Filed Nov. 25, 1942. [47]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWER TO DEFENDANT'S
REQUEST FOR ADMISSIONS UNDER
RULE No. 36

The plaintiff Northwestern Mutual Fire Association, a corporation, does hereby admit that each and all of the statements contained in the defendant's request for admissions under rule 36 are true and correct with the exception that the said plaintiff denies that the said exhibits are correct in the following particulars:

I.

Exhibit "4" shows signature of C. H. Cady.

II.

The various superficial stamps shown on Exhibit "6" were not on said document when it was transmitted to the defendant.

III.

Exhibits "10," "12," "15," and "17" show signatures of R. P. Swan.

IV.

Exhibit "19" bore date actually of January 6, 1941. It was, however, actually received by the addressee on or about January 8, 1942.

H. C. BELT.

SHANK, BELT, RODE &
COOK,

Attorneys for Plaintiff.

Copy received Dec. 4, 1942.

BOGLE, BOGLE & GATES.

[48]

State of Washington,
County of King—ss.

G. H. Thompson, being first duly sworn, upon oath deposes and says:

That he is Vice President of the above named plaintiff corporation; that he has read the foregoing answer to defendant's request for admissions under rule No. 36, knows the contents thereof, and believes the same to be true.

G. H. THOMPSON.

Subscribed and sworn to before me this 4th day of December, 1942.

[Seal] H. C. BELT,
Notary Public in and for the State of Washington, resident at Seattle.

[Endorsed]: Filed Dec. 4, 1942. [49]

[Title of District Court and Cause.]

DEPOSIT AND TENDER OF
RETURN PREMIUM

To: Northwestern Mutual Fire Association, the Plaintiff above named, and to its attorneys of record herein, Messrs. Shank, Belt, Rode & Cook, and to the Clerk of the Above Entitled Court:

You and Each of You Are Hereby notified that, Whereas, the above entitled court on June 14, 1943, rendered its oral decision herein in favor of the defendant and against the plaintiff, holding that the actual net retention of the plaintiff on the Tacoma Narrows Bridge was \$32,000.00, instead of \$50,000.00, and that, under Article XIV of the Treaty of January 1, 1940, between plaintiff and defendant, the amount reinsured by the plaintiff with the defendant must be considered to be \$32,000.00: and

Whereas, despite the fact that the defendant is under no legal obligation to pay a return premium

with respect to said reinsurance, and despite the further fact that the plaintiff has never demanded credit for a return premium but, on the contrary, has notified the defendant that there is no return premium due, the defendant nevertheless desires, in view of the court's decision, to adjust the reinsurance premium on the basis of a \$32,000.00 cession; now, therefore,

The defendant, Union Mutual Fire Insurance Company, without prejudice to or waiver of any of its legal rights in this cause, hereby deposits in the registry of the above entitled court for the benefit of the plaintiff, Northwestern Mutual Fire Association, and hereby tenders to the plaintiff the sum of \$121.58.

That the amount of said tender is computed on the basis of a gross return premium of \$216.00; 52½% of this gross amount has been deducted as a credit to the defendant in accordance with Article XI of said Treaty, leaving a net return premium of [50] \$102.60. To this latter amount has been added interest at six per cent per annum from the date of said cession to date hereof, making a total amount of \$121.58, which is the amount of this deposit and tender.

The clerk of the above entitled court is hereby authorized and directed to pay said sum of \$121.58 to the plaintiff or its attorneys of record herein upon obtaining proper receipt therefor.

Dated at Seattle, Washington, this 19th day of June, 1943.

UNION MUTUAL FIRE IN-
SURANCE COMPANY,

By BOGLE, BOGLE & GATES,
RAY DUMETT,

Its Attorneys of Record
herein.

Copy hereof received this June 19, 1943.

SHANK, BELT, RODE &
COOK.

E

[Endorsed]: Filed June 22, 1943. [51]

[Title of District Court and Cause.]

DEFENDANT'S AMENDED ANSWER TO
PLAINTIFF'S AMENDED COMPLAINT

Comes now the defendant above named and for amended answer to plaintiff's amended complaint herein admits, denies and alleges as follows:

I.

Answering paragraphs I, II, III and IV of said amended complaint, admits the same.

II.

Answering paragraph V of said amended complaint, admits that the plaintiff executed and de-

livered to the Washington Toll Bridge Authority its policy of insurance No. 614-3652, wherein it insured the said Washington Toll Bridge Authority against loss or damage by various risks therein specified upon the Tacoma Narrows Bridge and approaches (but excluding the Administration Building) in the sum of \$350,000.00, and further admits that the plaintiff thereafter sent to the defendant written notification that the plaintiff had ceded to the defendant \$50,000.00 reinsurance upon said policy of insurance; but the defendant denies each and every other allegation in said paragraph contained, except to the extent that the same are hereinafter expressly admitted in the defendant's affirmative defense herein. [52]

III.

Answering paragraph VI of said amended complaint, admits that on November 7, 1940, the said insured property suffered considerable damage from a risk or risks within the scope of said policy; further admits that the Washington Toll Bridge Authority made claim against the plaintiff in the full amount of the said policy as for a total loss; further admits that the plaintiff on August 21, 1941, paid to said Washington Toll Bridge Authority in full compromise settlement of its claim against the plaintiff the sum of \$269,230.78; further admits that the plaintiff on or about August 21, 1941, delivered to the defendant claim of loss in the sum of \$38,461.54, and demanded that the defendant pay said sum to the plaintiff; and further admits that the defendant has refused to pay said sum

or any sum in excess of \$24,615.38; but this defendant denies each and every other allegation in said paragraph contained, and further particularly denies that the share which the defendant should reimburse the plaintiff is the sum of \$38,461.54, as alleged in said paragraph, or any sum in excess of \$24,615.38.

IV.

Answering paragraph VII of said amended complaint, admits that the plaintiff, in investigating, adjusting and compromising the said loss and in defending the litigation carried on between the plaintiff and the said insured on account of said loss, necessarily expended the sum of \$11,810.20; and further admits that the defendant has not paid the sum of \$1,687.18, alleged in said paragraph to be defendant's share of the total sum so expended; but the defendant denies each and every other allegation in said paragraph contained, and particularly denies that the defendant's share of said expense is \$1,687.18, as alleged in said paragraph, or any sum in excess of \$1,008.93. [53]

V.

Answering paragraph VIII of said amended complaint, admits that on or about December 29, 1941, the plaintiff, through its counsel, sent through the mail a letter addressed to the defendant in the form set forth in said paragraph; further admits that on or about the 6th day of January, 1942, the defendant sent through the mail a letter addressed to said counsel for the plaintiff in the form

set forth in said paragraph; but the defendant denies each and every other allegation in said paragraph contained.

VI.

Answering paragraph IX or said amended complaint, denies each and every allegation therein contained.

FIRST AFFIRMATIVE DEFENSE

Further answering plaintiff's amended complaint herein, and by way of Affirmative Defense thereto, the defendant alleges as follows:

That the plaintiff's amended complaint herein fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Further answering plaintiff's amended complaint herein, and by way of an Affirmative Defense thereto, the defendant alleges as follows:

I.

That at all times mentioned in the plaintiff's amended complaint herein the Reinsurance Agreement set forth in paragraph III of said amended complaint was, and still is, in full force and effect.

II.

That Article VIII of said Reinsurance Agreement provides, [54] amongst other things, that cessions of reinsurance thereunder shall in no case and at no time on one risk exceed \$25,000.00 nor the

amount retained net, without reinsurance, by the reinsured company, as its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company. That by the terms of said Article VIII the plaintiff, in making the cession of \$50,000.00 of reinsurance mentioned in paragraph V of the amended complaint herein, was required to retain net, as provided in said Article, an amount of not less than \$50,000.00. That the plaintiff in making said cession represented to the defendant that it was retaining \$50,000.00 net of said insurance, as provided in said Article. That, relying upon the terms of said Reinsurance Agreement and believing and relying upon said representation of the plaintiff, the defendant approved said cession of \$50,000.00. That at the time said cession was made the plaintiff, contrary to its said representation and in violation of said Article VIII and without notifying the defendant thereof, reinsured all but \$32,000.00 of the total insurance of \$350,000.00 covered by plaintiff's said Policy No. 614-3652, mentioned in paragraph V of the amended complaint herein; and the amount of said insurance then, and at all times thereafter, retained net by the plaintiff, without reinsurance, at its own risk and liability under Article VIII of said Reinsurance Agreement was only \$32,000.00; whereas under the terms of said Article VIII the plaintiff, in ceding said \$50,000.00 of reinsurance to the defendant, was required to retain net at all times, without reinsurance, at its own risk and liability, an amount not less than \$50,000.00

of said insurance. That the defendant had no notice or knowledge of the plaintiff's said violation of Article VIII of said Reinsurance Agreement, or of the plaintiff's failure to comply with its said representation, until a date subsequent to the [55] loss of the Tacoma Narrows Bridge, to-wit, on or about October 1, 1941.

III.

That, in view of the fact that the actual amount of said insurance retained net by the plaintiff, under said Article VIII, was only \$32,000.00 instead of \$50,000.00, as required by said Article, the maximum amount of such insurance which the plaintiff was authorized by said Reinsurance Agreement to cede to the defendant was only \$32,000.00.

That Article XIV of said Reinsurance Agreement provides as follows:

“Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company

If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with.”

That, in view of the facts aforesaid and of the provisions of said Article XIV, the amount actu-

ally due from the defendant to the plaintiff herein, including defendant's share of the loss alleged in paragraph VI of plaintiff's amended complaint and defendant's share of the investigation, adjustment and litigation expenses alleged in paragraph VII of said amended complaint, is the sum of \$25,-624.31, which sum the defendant has at all times been ready and willing to pay the plaintiff. That the defendant hereby tenders to the plaintiff said sum of \$25,624.31, plus interest at six per cent per annum to June 21, 1942, or a total amount of \$26,-897.55, which tender is hereby made without prejudice to, or waiver of, the defendant's objections and defenses to the claim of [56] the plaintiff herein for any amount in excess of the amount so tendered; and it is hereby agreed that the plaintiff's acceptance of the amount hereby tendered shall be without prejudice to, or waiver of, the excess of the plaintiff's claim herein over and above the amount so tendered. That the amount so tendered, if not accepted by the plaintiff, will be forthwith deposited by the defendant in the registry of the above-entitled Court.

IV.

That the defendant has done and performed all acts and things required of it by the said Re-insurance Agreement.

Wherefore, having fully answered the amended complaint of the plaintiff herein, defendant prays that the above-entitled cause be dismissed with

prejudice and that the defendant have and recover its costs and disbursements herein to be taxed.

BOGLE, BOGLE & GATES,
RAY DUMETT,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1942. [57]

[Title of District Court and Cause.]

LEAVE TO DEPOSIT TENDER OF RETURN
PREMIUM

Now on this 22nd day of June, 1943, Jo D. Cook of the firm of Shank, Belt, Rose & Cook, appearing for the plaintiff, and Ray Dumett appearing as counsel for the defendant, this cause comes on before the court for entry of findings of fact, conclusions of law and judgment. On oral motion of the defendant company, leave is granted for the defendant company to deposit and tender of return premium in the sum of \$121.58.

Findings of fact and conclusions of law are signed.

Judgment and decree is signed. [58]

[Title of District Court and Cause.]

DOCKET ENTRIES

* * *

June 22, 1943—Filed Deposit and Tender of
Return Premium (\$121.58)

That a copy of said treaty is set forth on pages 1 to 13, inclusive, of plaintiff's amended complaint herein.

IV.

That Article VIII of said treaty of January 1, 1940, provides, among other things, that cessions of reinsurance thereunder by the plaintiff to the defendant shall in no case and at no time on one risk exceed \$25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company.

That Article VII of said treaty provides, among other things, that reinsurance ceded by the plaintiff to the defendant thereunder shall be ceded on the daily report plan.

V.

That during the year 1940 the Washington Toll Bridge Authority constructed a single-span suspension bridge across the Tacoma Narrows, near Tacoma, Washington, known as the Tacoma Narrows Bridge. That the plaintiff directly wrote \$350,000 of insurance on the Tacoma Narrows Bridge, insuring the Washington Toll Bridge Authority against loss or damage by various risks, including windstorm and collapse, upon the Tacoma Narrows Bridge and approaches (but excluding the Ad- [62] ministration Building). That the plaintiff specifically reinsured \$3000,000 of that amount with various insurance companies, including the de-

fendant, under the plaintiff's various reinsurance treaties.

VI.

That, in as much as the maximum amount which the plaintiff could cede to the defendant on one risk under Article VIII of said treaty was \$25,000, and since the plaintiff desired to cede to the defendant more than said maximum amount of reinsurance on the Tacoma Narrows Bridge, the plaintiff on June 10, 1940, wired the defendant asking for specific authorization to do so. That in said wire of June 10, 1940, introduced in evidence herein as Defendant's Exhibits A-1 and A-2, the plaintiff stated:

"Please refer our letter May 31 Washington Toll Bridge Authority — Tacoma Narrows Bridge. Further information just received indicates PML about 50 %.

"We will retain \$50,000. Please wire your authorization."

That on June 11, 1940, the defendant wired the plaintiff authorizing said cession of \$50,000 of reinsurance on the Tacoma Narrows Bridge. That said wire has been introduced in evidence herein as Defendant's Exhibit A-3.

VII.

That some time in June 1940 the plaintiff transmitted to the Defendant its Daily Report, or Certificate of Reinsurance, No. 10852 (introduced in evidence herein as Defendant's Exhibit A-5). That

in said daily report plaintiff stated to the defendant that it was ceding to the defendant \$50,000 of reinsurance on the Tacoma Narrows Bridge and approaches (but excluding the Administration Building) effective July 1, 1940. That in this daily report the plaintiff further stated to the defendant that the P. M. L. was 50% and that the plaintiff [63] "retains indential \$50,000".

VIII.

That the plaintiff's statement in its said wire of June 10, 1940, that it would retain \$50,000, and the plaintiff's statement in said daily report No. 10852 that it was retaining "identical \$50,000", constituted warranties to the defendant that the plaintiff was retaining, under Article VIII of said treaty, \$50,000 net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the said reinsuring company. That the defendant, believing and relying upon the plaintiff's said warranties as it was justified in doing, authorized and approved said cession of \$50,000. That said cession by the plaintiff to the defendant was a cession of \$50,000 of reinsurance upon the Tacoma Narrows Bridge and approaches as one unit and risk, the single-risk maximum of \$25,000, designated by Article VIII of said treaty, being increased to \$50,000 by the above mentionel specific authorization and approval of the defendant, pursuant to and in accordance with the provision of Article VIII of said treaty permitting this to be

done in specific cases subject to the approval of the defendant. That the court finds that said reinsurance was not ceded to the defendant upon a two-risk or multiple-risk basis, but, on the contrary, was ceded on a one-risk basis.

IX.

That on November 7, 1940, the Tacoma Narrows Bridge suffered considerable damage from a risk within the scope of the insurance policy written by the plaintiff upon said bridge; and the Washington Toll Bridge Authority made claim against the plaintiff to the full amount of said policy as for a total loss. That a lawsuit for recovery of the claimed [64] loss was instituted by the Washington Toll Bridge Authority against the various insurance companies which had written direct insurance upon said bridge, and this suit was finally settled by the Authority and said direct insurers for a total amount of \$4,000,000, which was approximately 77% of the total amount of the direct insurance written upon said bridge. That this sum of \$4,000,000 was paid to the Washington Toll Bridge Authority by the various direct insurers.

That on August 25, 1941, the plaintiff wrote the defendant, confirming said settlement and enclosing proof of loss indicating payment due from the defendant to the plaintiff in the amount of \$38,461.54. That said proof of loss has been introduced in evidence herein as Defendant's Exhibit

A-6. That said proof of loss contains, among other things, the following statement:

“The net loss sustained by the reinsured company after deducting all reinsurance, was \$38,461.54 (prior to excess).”

That on September 8, 1941, the defendant wrote the plaintiff, acknowledging receipt of the plaintiff's said letter of August 25, 1941, and the enclosed proof of loss. That said letter of September 8, 1941, has been introduced in evidence herein as Defendant's Exhibit A-7. That in said letter the defendant stated:

“We have your letter of August 25, confirming adjustment of the above loss for a total amount of \$4,000,000 with \$5,200,000 of insurance to contribute, and enclosing proof of loss indicating payment due from the Union in an amount of \$38,461.54. We note that in the proof of loss you have shown the net loss sustained by the Northwestern as the same amount of \$38,461.54, but have indicated this net loss to be ‘prior to excess’.

“We do not understand exactly what this means, and would appreciate a further explanation on this point, as it was our understanding as indicated in certificate No. 10852 that the Northwestern retained absolutely net an amount of \$50,000 on this risk. If this is not the case and the Northwestern's net, [65] without reinsurance, is not \$50,000 and your actual loss will therefore be less than the

amount indicated, we would appreciate it if you would advise us exactly what your net loss will be on the risk."

That on October 1, 1941, the plaintiff wrote the defendant, answering the defendant's said letter of September 8, 1941. That said letter of October 1, 1941, has been introduced in evidence herein as Defendant's exhibit A-8. That in said letter the plaintiff stated in part:

"The facts of the matter are that at the time this policy was written and the reinsurance placed, the Northwestern had in effect a catastrophe excess reinsurance contract whereby we were reinsured to the extent of 90% of all loss in excess of \$30,000 in any one catastrophe, although in establishing our net line this fact was given no consideration whatsoever."

X.

That the excess of loss reinsurance contract referred to in the plaintiff's said letter of October 1, 1941, has been introduced in evidence in this case as Plaintiff's Exhibit 1. That said contract, which was executed between the plaintiff and Lloyd's, became effective on January 1, 1940, and at all times herein mentioned was and still is in full force and effect. That by the terms of said contract the plaintiff was reinsured for 90% of any net amount for which it might become liable in excess of \$30,000 in any one loss, but in no event to exceed \$200,000. That said contract applied to the Tacoma Narrows Bridge, and, as

applied to said bridge, constituted a type of reinsurance, known as excess of loss reinsurance.

XI.

That on October 10, 1941, the defendant wrote the plaintiff, acknowledging receipt of the plaintiff's said letter of October 1, 1941. That said letter of October 10, 1941, has been introduced in evidence herein as Defendant's Exhibit A-9. That this letter states in part: [66]

"On the basis of this information, it would appear that we have been overlined on this risk, as our reinsurance contract with you, under which you cede business to us, provides that cessions shall, in no case, exceed the amount retained net, without reinsurance by the Northwestern.

"On the basis of your letter, we believe that the actual net amount retained by the Northwestern without reinsurance was only \$32,000, instead of \$50,000 as indicated in the certificate, and, on the basis of the contract, our Union line should also have been not exceeding \$32,000, which, on the basis of an approximate 77% loss, would make our loss payment only approximately \$25,000, instead of \$38,461.54 as called for by the proof of loss submitted."

XII.

That the purpose of the net retention provision in Article VIII of said reinsurance treaty of January 1, 1940, is to assure the reinsurer that the

ceding company will at all times have as much at stake, dollar for dollar, in the particular insurance as the reinsurer, since the reinsurer must depend upon the knowledge, judgment, diligence and good faith of the ceding company in investigating and appraising the risk, placing the original insurance and making investigations and adjustments in the event of loss.

XIII.

That, by virtue of the existence of said excess of loss reinsurance contrast between the plaintiff and Lloyd's (Plaintiff's Exhibit 1), the maximum liability of the plaintiff in the event of any one loss to the Tacoma Narrows Bridge was \$32,000; and the actual amount retained net under Article VIII of said treaty by the plaintiff, without reinsurance at its own risk and liability on the same property so reinsured by the plaintiff with the defendant, was at all time \$32,000; and these facts were readily determinable by, and known to, the plaintiff at the time it made said cession to the defendant. [67]

That the plaintiff, in making said cession of \$50,000 of reinsurance to the defendant, owed to the defendant an obligation of the highest good faith to correctly compute and advise the defendant of the plaintiff's actual net retention under Article VIII of said reinsurance treaty and to further advise the defendant of all relevant facts bearing upon said net retention and the nature of the risk. That the plaintiff did not inform the

defendant, as it should have done, that its actual net retention was \$32,000, and not "identical \$50,000" as represented and warranted to the defendant. That the defendant has been prejudiced by reason of said failure on the plaintiff's part. That, in view of the plaintiff's actual net retention of \$32,000, the plaintiff was without right or authority, under Article VIII of said treaty, to cede to the defendant more than \$32,000 of reinsurance on said bridge.

XIV.

That said reinsurance treaty of January 1, 1940, between the plaintiff and the defendant provides in Article XIV as follows:

"Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with."

That the defendant was and is entitled to demand, as it did demand, that its liability with respect to such reinsurance be adjusted in accordance with the provisions of said Article XIV. That had the provision governing net retention in Article

VIII of said treaty been complied with by the plaintiff, the defendant would have been ceded \$32,000 of reinsurance and would have been liable for its pro rata share of the loss, [68] computed on the basis of a \$32,000 cession. That the court finds that the amount of defendant's liability to the plaintiff with respect to said reinsurance must be determined under the Article XIV on the basis of a \$32,000 cession.

XV.

That the amount of defendant's actual liability to the plaintiff, computed in accordance with Article XIV of said reinsurance treaty, was \$25,624.31. That said amount, plus interest at 6% per annum to June 21, 1942, or a total amount of \$26,897.55, was tendered and paid by the defendant to the plaintiff on June 20, 1942, and was accepted by the plaintiff on that date. That it was stipulated and agreed, however, by the parties hereto that said payment was made and accepted without prejudice to, or waiver of, the plaintiff's claim for any amount in excess of the sum so paid, and without prejudice to, or waiver of, the defendant's objection and defenses to the plaintiff's claim for any amount in excess of the sum so paid. That the plaintiff has been fully paid by the defendant all the plaintiff is entitled to receive from the defendant.

XVI.

That during the trial herein the court permitted the plaintiff to make a trial amendment to its amended complaint herein as follows:

“X.

“That, under the usages and custom of the insurance business and in the insurance world, the term ‘net retention’ or the term ‘amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company’s does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention.”

That the court, out of an abundance of caution, provisionally permitted the plaintiff to introduce testimony to [69] support the allegations of said trial amendment and permitted the defendant to introduce evidence in rebuttal thereto. That the court finds that the terms of Article VIII of said treaty of January 1, 1940 are plain, clear and unambiguous and do not permit of modification, amendment or interpretation by extrinsic evidence. That the court further finds that in any event, under the customs and usages of the insurance business and in the insurance world, the term “amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company”, as used in Article VIII of said treaty, does ~~not~~ include and does apply to excess loss of reinsurance such as Plaintiff’s Exhibit 1, and means what it says, namely: the

amount retained net by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company after deducting all reinsurance, including excess of loss reinsurance such as Plaintiff's Exhibit 1.

XVII.

That the plaintiff introduced testimony to support its contention that the term "P. M. L." ("probable maximum loss"), as used in its wire of June 10, 1940, and its daily report No. 10852, indicated two risks; and the defendant introduced testimony in rebuttal thereto. The court finds from a preponderance of the evidence that the contention of the plaintiff in this regard is not sustained, and further finds that said term did not and does not indicate two risks or a multiplicity of risks as applied to the facts and circumstances in this case.

Done in open court this 22nd day of June, 1943.

(Signed) JOHN C. BOWEN

United States District Judge.

[70]

From the within and foregoing Findings of Fact the Court, being fully advised in the premises, now makes and enters the following

CONCLUSIONS OF LAW

I.

That the plaintiff is entitled to no recovery from the defendant herein. That the defendant is entitled to a judgment and decree herein dismissing this cause, together with the complaint and amended

complaint upon which the same is based, with prejudice and with costs to the defendant.

Done in open court this 22d day of June, 1943.

(Signed) JOHN C. BOWEN

United States District Judge

Presented by:

RAY DUMETT

of Bogle, Bogle & Gates
Attorneys for Defendant.

Copy hereof received this June 19, 1943.

SHANK, BELT, RODE & COOK
E.

[Endorsed]: Filed June 22, 1943.

In the District Court of the United States for the
Western District of Washington, Northern Division.

No. 480

NORTHWESTERN MUTUAL FIRE ASSOCIATION, a corporation,

Plaintiff,

vs.

UNION MUTUAL FIRE INSURANCE COMPANY, of Providence, Rhode Island, a corporation,

Defendant.

JUDGMENT AND DECREE

The above entitled cause having come on regularly for trial before the undersigned Judge of the

above entitled Court, sitting without a jury, on December 29 and 30, 1942, and said trial continuing on March 3 and 4, 1943, the plaintiff appearing by its attorneys of record, Messrs. Shank, Belt, Rode & Cook and Mr. Jo Cook, and the defendant appearing by its attorneys of record, Messrs. Bogle, Bogle & Gates and Mr. Ray Dumett; both parties having introduced their evidence and having rested; written briefs having thereafter been served and filed by both parties and both parties having thereafter orally argued the cause; the court at the conclusion of the oral argument having orally announced its decision in favor of the defendant and against the plaintiff; and the court having heretofore duly made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises; now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiff take nothing by its complaint and amended complaint herein, and that the above entitled cause, and the complaint and amended complaint upon which the same is based, be and the same are hereby dismissed, with prejudice; and it is further

Ordered, Adjudged and Decreed that the defendant do have [72] and recover herein from the plaintiff its costs and disbursements herein to be taxed.

Done in open court this 22nd day of June, 1943.

(Signed) JOHN C. BOWEN

United States District Judge.

Presented by:

RAY DUMETT

of Bogle, Bogle & Gates
Attorneys for Defendant.

[Endorsed]: Filed June 22, 1943. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given That Northwestern Mutual Fire Association, a corporation, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth District from the final judgment entered in this action on June 22, 1943.

Dated at Seattle, Washington, this 8th day of September, 1943.

JO D. COOK

H. W. BELT

Attorneys for Appellant
Northwestern Mutual Fire
Association, a corporation.

[Endorsed]: Filed Sept. 9, 1943. [74]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents: That we, Northwestern Mutual Fire Association, a corpora-

tion, as Principal, and National Surety Corporation, a corporation of the State of New York, authorized to become sole surety on bonds in the State of Washington, as Surety, are held and firmly bound unto Union Mutual Fire Insurance Company, of Providence, Rhode Island, a corporation, Defendant above named, as Obligee, in the penal sum of Two Hundred And Fifty And no/100s (\$250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated and Sealed this 7th day of September, 1943.

Whereas, on the 22nd day of June, 1943, the above entitled Court rendered and entered final judgment in the above entitled cause in favor of the above named Obligee.

And Whereas, said Northwestern Mutual Fire Association, a corporation, Plaintiff, feeling aggrieved by said judgment and desiring to appeal from the same to the Circuit Court of Appeals for the Ninth District and perfect said appeal by this bond;

Now, Therefore, the Condition of the Above Obligation is Such: That if the said appellant will pay all costs and damages that may be awarded against it on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty And no/100s

(\$250.00) Dollars, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal] NORTHWESTERN MUTUAL
 FIRE ASSOCIATION:

By: J. D. COOK,
 its attorney

 NATIONAL SURETY CORPO-
 RATION:

By: V. EVERS
 Attorney-in-Fact.

[Endorsed]: Filed Sept. 9, 1943. [75]

[Title of District Court and Cause.]

STATEMENT BY APPELLANT ON POINTS
ON WHICH IT INTENDS TO RELY.

Comes now the Northwestern Mutual Fire Association, the above named plaintiff and appellant, and makes this statement of the points on which it intends to rely on the appeal herein:

1. The evidence as introduced in this case shows that as a matter of law that the defendant at all times knew that the plaintiff had the catastrophe excess insurance which it had.

2. The evidence as introduced in this case shows as a matter of law that there was no risk (as such term is understood among insurance men in general) involved in the insurance of the Tacoma Narrows Bridge, at issue in this case, greater than fifty

per cent of such insurance, and such fact was duly communicated to the defendant.

3. The evidence as introduced in this case shows as a matter of law that according to the universal custom and usage in the re-insurance business, excess catastrophe insurance such as it appears herein that the plaintiff had, is never taken into account in computing the net retention of the reinsured.

[76]

4. Full premium for \$50,000.00 of reinsurance had been paid by plaintiff to defendant and, prior to judgment herein, no payment or tender of payment had been made by defendant to plaintiff on account of any reduction of such reinsurance.

5. Under the evidence in this case the trial court should have found for the plaintiff and entered judgment in its favor as prayed in the amended complaint.

JO D. COOK

H. C. BELT

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Sept. 10, 1943. [77]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL.

Comes now the above named plaintiff and appellant and designates the following portions of the

record proceedings and evidence to be contained in the record on appeal, to-wit:

1. Transcript of Record on Removal.
2. Amended Complaint.
3. Amended Answer to Amended Complaint.
4. Findings of Fact and Conclusions of Law.
5. Judgment and Decree.
6. Notice of Appeal.
7. Appeal Bond.
8. Appellant's Designation of Contents of Record on Appeal.
9. Plaintiff's Designation of Evidence to be Contained in Record on Appeal.
10. Statement by Appellant of Points on which it Intends to Rely.

JO D. COOK

H. C. BELT

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Sept. 10, 1943. [78]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

This matter having come on regularly for hearing on the 27th day of September, 1943, upon the defendant's motion for transmission of original exhibits to the Circuit Court of Appeals pursuant to

Rule 75 of the Rules of Civil Procedure; the plaintiff having stated that it had no objection to the granting of said motion, and this Court being of the opinion that the original exhibits designated in said motion should be inspected by the appellate court and sent to the appellate court, in lieu of copies, now, therefore, it is hereby

Ordered that the Clerk of the above entitled Court be and he is hereby authorized and directed to transmit to the United States Circuit Court of Appeals for the Ninth Circuit the following original exhibits herein, to-wit: Exhibits A-14, A-15, A-16 and A-17, at the time that the record on appeal in this case is transmitted to said Court.

Done in open Court this 29th day of September, 1943.

JOHN C. BOWEN

Judge

Presented by

RAY DUMETT

of Counsel for defendant

Approved:

BOGLE, BOGLE & GATES

RAY DUMETT

Attys. for Deft.

SHANK, BELT, RODE & COOK & JO D.
COOK

[Endorsed]: Filed Sept. 29, 1943. [86-a]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 86 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by the designation and counter designation of record on appeal filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same together with Agreed Designation of Evidence to be contained in Record on Appeal, which is sent up in original form as part of this record on appeal, together with certain original exhibits transmitted under separate certificate, constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Act February 11, 1925) for making record, certificate or return, 145 folios at .05c.....	\$ 7.25
and 96 folios at .15c	14.40
Appeal fee, (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record.....	.50
Certificate of Clerk to Original Exhibits.....	.50
Total.....	\$ 27.65
	[87]

I further certify that the foregoing fees have been paid by the attorneys for the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 13th Day of October, 1943.

[Seal] JUDSON W. SHORETT,
Clerk

By TRUMAN EGGER
Chief Deputy [88]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF EVIDENCE

It is hereby Stipulated by and between the parties hereto through their respective attorneys of record herein, that the attached document designated as Agreed Designation of Evidence to be contained in Record on Appeal, is the designation of

evidence to be contained in such Record agreed to by the parties hereto.

Dated this 15th day of October, 1943.

SHANK, BELT, RODE & COOK
JO D. COOK

Attorneys for Appellant

BOGLE, BOGLE & GATES
RAY DUMETT

Attorneys for Appellee.

Received Oct. 15, 1943. Office of Clerk, U. S.
District Court, Seattle, Washington.

[Endorsed]: Filed Oct. 15, 1943.

[Title of District Court and Cause.]

AGREED DESIGNATION OF EVIDENCE TO
BE CONTAINED IN RECORD ON AP-
PEAL.

Be It Remembered, that on the 29th day of December, 1942, at the hour of 2:00 o'clock p.m. the above entitled and numbered cause came on for trial before the Honorable John C. Bowen, one of the Judges of the above entitled court, sitting in Department No. 1 thereof, at the United States Courthouse, in the City of Seattle, County of King, State of Washington; the plaintiff appearing by its attorneys Messrs. Shank, Belt, Rode & Cook (by

Mr. H. C. Belt and Mr. Jo D. Cook), and the defendant appearing by its attorneys Messrs. Bogle, Bogle & Gates (by Mr. Ray Dumett); both sides having announced they were ready for trial; the Court having tendered the parties the right of a pre-trial if desired, and counsel for plaintiff and counsel for defendant having stated they did not desire a pre-trial;

Whereupon the following proceedings were had and testimony given, to-wit:

Counsel for both parties with approval of the Court, agreed that Defendant should offer its evidence first. [1*]

The Court: I will approve of that. Much has been said in the statements on both sides about custom. Is there any question between you as to whether or not that is sufficiently pleaded?

Mr. Dumett: I am glad your Honor asked that question, because it is our position that no evidence of custom or usage is admissible and that it is not material or relevant to this case, our position being the contract, the letters and documents sent pursuant to that contract, speak for themselves, are clear and unambiguous and do not admit of construction by evidence dehors the record, by extrinsic evidence, by proof of custom or anything else, and we further contend that any such evidence is inadmissible because not properly pleaded by the plaintiff. It is our position the plaintiff in its complaint relies on the contract, the written contract

* Page numbering appearing at top of page of original Reporter's Transcript.

between the parties, and it allows of no modification by extension or change, by proof of custom or usage, and we contend that is a collateral field because it is not within the pleadings and not within the issues. [1a]

DEFENDANT'S EVIDENCE

Defendant's Exhibits "A-1" to "A-9," inclusive, were offered by defendant and admitted in evidence, the material parts of which are as follows:

DEFENDANT'S EXHIBIT "A-1"

Seattle, Washington

June 10, 1940

Union Mutual Fire Insurance Company

10 Weybosset Street

Providence, Rhode Island

Please refer our letter May 31st Washington Toll Bridge Authority-Tacoma Narrows Bridge. Further information just received indicates PML about 50%.

We will retain \$50,000. Please wire your authorization.

Northwestern Mutual Fire Association

RFE gh

Day Letter

30 Words

11:10 A.M.

DEFENDANT'S EXHIBIT "A-2"

This is identical with Defendant's Exhibit "A-1."

DEFENDANT'S EXHIBIT "A-3"

Providence RI June 11, 1940

Northwestern Mutual Fire Assn

Third Ave & Pine St

Seattle Washington

Authorize \$50,000. Washington Toll Bridge Authority [2] Tacoma Narrows Bridge

Union Mutual Fire Insurance Co.

C. H. Cady

DEFENDANT'S EXHIBIT "A-4"

June 11, 1940

Northwestern Mutual Fire Ass'n.

Third Ave. & Pine St.

Seattle, Washington

Washington Toll Bridge Authority

Gentlemen:

In reply to your telegram and in confirmation of ours of even date we authorize you to bind \$50,000. reinsurance of your company covering the above

bridge. Kindly let us know the date you wish this authorization bound.

Very truly yours,

(Signed) C. H. CADY
Secretary.

CHC:MBC

DEFENDANT'S EXHIBIT "A-5"

Report of Reinsurance Placed by the
Northwestern Mutual Fire Association
Seattle, Washington
with

Union Mutual Fire Insurance Company
Providence, Rhode Island

on its policy or policies issued for the
term of

Annual Payment to Washington Toll Bridge
Authority etal

Northwestern retains (a) identical \$50000 (b) other
in or on \$. P.M.L. 50%. Protection.

[3]

Synopsis or Copy of Form
on Tacome Narrows Bridge and Approaches (but
excluding Administration Building), in the State
of Washington.

Assured's Address: Tacoma Narrows Bridge, Wash.
In accordance with your authorization

DEFENDANT'S EXHIBIT "A-6"

Reinsurance Proof of Loss

To the Union Mutual Fire Insurance Company
 of Providence, Rhode Island
 Insured Washington Toll Bridge Authority
 Location Olympia, Washington

Date of Loss	Time	Damaged by	Cause
11/7/40	10:30 A.M.	Wind	Wind

	Reinsured Co.	Reinsuring Co.
Claim No.	223937	
Policy No.	613-3652	10852
Policy Dates	7-1-40-41	7-1-40-41
Amount of Policy	\$350,000	\$50,000
Loss	\$269,230.78	\$38,461.54

Adjusting Expense	_____	_____
	\$	\$
Total Claim	_____	_____

Loss was paid by reinsured company on
 Date August 20, 1941

The net loss sustained by the reinsured company
 after deducting all reinsurance was \$38,461.54
 (prior to excess)

Dated at Seattle, Washington, August 21, 1941.

NORTHWESTERN MUTUAL
 FIRE ASSOCIATION.

(Signed) G. H. THOMPSON
 Vice-President

Subscribed and sworn to before me this 21st day
 of August, 1941. [4]

C. F. REYNOLDS
 Notary Public

DEFENDANT'S EXHIBIT "A-7"

September 8, 1941

Mr. H. C. Heath, Asst. Secretary
Northwestern Mutual Fire Association
Northwestern Mutual Insurance Building
Pine at Third
Seattle, Washington

Re: Washington Toll Bridge Authority
Loss November 7, 1940

Dear Sir:

We have your letter of August 25, confirming adjustment of the above loss for a total amount of \$4,000,000 with \$5,200,000 of insurance to contribute and enclosing proof of loss indicating payment due from the Union in an amount of \$38,461.54. We note that in the proof of loss you have shown the net loss sustained by the Northwestern as the same amount of \$38,461.54, but have indicated this net loss to be "prior to excess".

We do not understand exactly what this means, and would appreciate a further explanation on this point, as it was our understanding as indicated in certificate #10852 that the Northwestern retained absolutely net an amount of \$50,000 on this risk. If this is not the case and the Northwestern net without reinsurance is not \$50,000 and your actual loss will therefore be less than the amount indicated,

we would appreciate it if you would advise us exactly what your net loss will be on the risk.

Very truly yours,

UNION MUTUAL FIRE
INSURANCE COMPANY [5]

(Signed)

R. P. SWAN

Assistant Vice President

rps/leb

DEFENDANT'S EXHIBIT "A-8"

Northwestern Mutual Fire Association
Northwestern Mutual Insurance Building
Pine at Third—Seattle

October 1, 1941

Fire & Inland Marine

Claim Department

G. H. Thompson, Vice President

H. D. Heath, Assistant Secretary

The Union Mutual Fire Insurance Company

Grosvenor Building

Providence, Rhode Island

Gentlemen:

- WASHINGTON TOLL BRIDGE AUTHORITY
LOSS NOVEMBER 7, 1940 -

We have delayed in reply to your letter of September 8 in which you inquire about the net loss sustained by the Northwestern, waiting to see if any other companies made the same inquiry.

The facts of the matter are that at the time this policy was written and the reinsurance placed, the

On the basis of this information, it would appear that we had been overlined on this risk, as our reinsurance contract with you, under which you cede business to us, provides that cessions shall, in no case, exceed the amount retained net without reinsurance by the Northwestern.

On the basis of your letter, we believe that the actual net amount retained by the Northwestern without reinsurance was only \$32,000 instead of \$50,000 as indicated in the certificate and, on the basis of the contract, our Union line should also have been not exceeding \$32,000 which, on the basis of an approximate 77% loss, [8] would make our loss payment only approximately \$25,000, instead of \$38,461.54 as called for by the proof of loss submitted.

We would, therefore, appreciate it if you would give this matter further consideration based on these circumstances and we would then be glad to have your further comments.

Very truly yours,

UNION MUTUAL FIRE
INSURANCE COMPANY

(sgd) R. P. SWAN

Assistant Vice President

RPS:leb

J. M. LEGRIS,

called as a witness by the Defendant, first duly sworn, testified as follows:

Direct Examination

By Mr. Dumett:

Q. Will you state your name in full?

A. J. M. Legris.

Q. Where do you reside?

A. Providence, Rhode Island.

Q. What position do you hold with the defendant in this case, the Union Mutual Fire Insurance Company?

A. I am assistant secretary.

Q. And you have been for approximately how long?

A. I have not been assistant secretary for as many years as I have been with the company, but I have been with the company over twelve years, and assistant secretary for approximately two years.

Q. You have been with the company for twelve years?

A. Over twelve years. [9]

Q. State generally what the nature of your work has been with the company during those twelve years, what work have you done?

A. In the spring of 1930 I was employed by the Union Mutual Fire Insurance Company as office manager of that company, with responsible duties over all the work of the company with the exception possible of investment work, which is work in

(Testimony of J. M. Legris.)

the hands of the president, and those duties gave me responsibilities over all classes of work in the office, whether it were underwriting or whether it were a matter of losses or a matter of accounting and statistics.

Q. It covered the general field?

A. It covered the general field, yes sir. I was the general office manager of the company.

Q. You have also had some connection with the insurance department of the State of Rhode Island, have you not?

A. Yes, sir. I was first examiner and actuary for the State of Rhode Island from 1920 to 1930, ten years.

Q. Have you had some connection also with the National Association of Insurance Companies?

A. Well, as an employee of the State of Rhode Island in the position I have just stated I was a member of the National Association of Insurance Commissioners, especially as a member of the so-called Committee on Blanks, which has the responsibility of the preparation of all forms that are used for the filing of the annual statements by insurance companies of all types.

Q. Now I want to call your attention to certain documents we have here. I hand you first, Mr. Legris, a photostatic copy of a telegram which has been marked Defendant's Exhibit "A-1", purporting to be a wire dated June 10, I [10] think, 1940, from the Northwestern Mutual Fire Association to

(Testimony of J. M. Legris.)

the Union Mutual Fire Insurance Company. You recognize that wire, do you? A. Yes, sir.

Q. And also defendant's Exhibit A-2, purporting to be a wire dated June 10, 1940, from Northwestern Mutual Fire Association to the Union Mutual Fire Insurance Company. Do you recognize that?

A. Yes, sir.

Q. And then also Defendant's Exhibit "A-3", purporting to be a wire of June 11, 1940, from the Union to the Northwestern—the same answer to that one? A. Yes, sir.

Q. Now calling particular attention to those exhibits, to a certain portion in Exhibit "A-1", the statement in the wire from the Northwestern to the Union: "We will retain \$50,000", and in Exhibit "A-2", June 10, 1940, from the Northwestern to the Union "We will retain \$50,000. Please wire your authorization", and in Exhibit "A-3" from the Union to the Northwestern "We authorize \$50,000", I will ask you first whether in accepting and retaining this cession of \$50,000 of reinsurance, the Union placed any reliance upon the statements that the Northwestern was retaining net \$50,000?

A. Yes, sir.

Q. Was that statement as to net retention of importance to your company in making its decision?

A. It certainly was.

Q. Why?

A. Because net retention in underwriting means the amount that a company on an individual risk retains net for its liability [11] in case of a loss on

(Testimony of J. M. Legris.)

that particular risk, and so upon seeing the net retention of the Northwestern given as \$50,000 the Union then, upon the confidence of that net retention, knew how to underwrite that particular amount of reinsurance, and it underwrote it in a special way, taking cognizance of the fact that if the Northwestern, a financially much stronger company than the Union, could take \$50,000 net retention, the Union, less strong financially, could not of course keep \$50,000 and protect itself under its underwriting; all based upon the \$50,000 net retention stated given to the Union.

Q. Now calling your attention to another exhibit, if I may, to Exhibit "A-5", the statement: "Northwestern retains identical \$50,000", does what you have said apply to that also?

A. Exactly, yes sir.

Q. Do you recall the loss of the Tacoma Narrow bridge occurring about November 7, 1940?

A. Yes, sir.

Q. Did you after that loss receive—did your company receive defendant's Exhibit "A-6", or the original of it?

A. Yes, sir.

Q. What is the date of that Exhibit A-6?

A. August 21, 1941.

Q. From the Northwestern to the Union?

A. Yes, sir; signed by Mr. Thompson, vice-president.

Q. I call your attention to the latter part of that exhibit which says: "The net loss so sustained by the reinsured company, after deducting all reinsur-

(Testimony of J. M. Legris.)

ance was \$38,461.54 prior to excess." Do you observe that? A. Yes, sir.

Q. Had your company at any time prior to the date it received Exhibit "A-6" been advised by the Northwestern of any excess [12] or any reinsurance affecting its net retention other than the net retention that had been previously given?

A. No, sir.

Q. Then I call your attention to Defendant's Exhibit "A-8" a letter from the Northwestern to the Union, in answer to the Union's letter of September 8, 1941, in which, among other things, it is stated by the Northwestern to the Union: "We have delayed in replying to your letter of September 8th in which you inquire about the net loss sustained by the Northwestern, waiting to see if any other company made the same inquiry.

The facts of the matter are that at the time this policy was written and the reinsurance placed, the Northwestern had in effect a catastrophe excess reinsurance whereby we were reinsured to the extent of 90% of all loss in excess of \$30,000 in any one catastrophe, although in establishing our net line this fact was given no consideration whatsoever."

Prior to the receipt of that letter of October 1, 1941, by your company, had your company been advised in any way by the Northwestern of this excess catastrophe reinsurance of which it speaks?

A. No, sir.

Q. Had you been advised, other than by this letter, of any reinsurance coverage that reduced

(Testimony of J. M. Legris.)

the net retention coverage of \$50,000 in any way?

A. No, sir.

Q. If your company at that time had been advised of the excess catastrophe reinsurance, and that the effect of this was to reduce the maximum liability of the Northwestern on the Tacoma Narrows bridge to \$32,000, instead of \$50,000, would [13] your company have approved this cession of \$50,000 to the Union?

A. It is very unlikely.

Q. If you had been advised of the actual facts at the time of the cession what would your company have done?

Mr. Cook: I think that is rather speculative, Your Honor.

The Court: The objection is sustained.

Q. Was the Union ever advised by the Northwestern prior to the loss of the Tacoma Narrows bridge that the Northwestern considered that this bridge involved two risks? A. No, sir.

Mr. Dumett: I believe you may examine.

Cross Examination

By Mr. Cook:

Q. What did the telegram in which the figures "extend PML 50%" mean to you? What did it mean to your company?

A. It meant to us that under circumstances of any loss the probable maximum loss might be 50%.

Q. Now, what has that to do in fixing the top limits of insurance which your company, or any other company, will write in one policy?

(Testimony of J. M. Legris.)

A. It has a lot to do with the amount of net retention that the company may keep upon a particular risk. It governs the underwriting of any particular risk.

A property may—there may be two properties involved, one a wooden property where the probable maximum loss might be the total property, and the company would underwrite that risk in a certain way, assuming just a small retention possibly, and there may be a brick building which is of good construction, and the company may not expect a loss [14] as large as on the wooden building, and the company would then retain more of an amount, because the probable maximum loss there is not as great as in the first place.

The probable maximum loss has only to do with the quality of the underwriting of a risk.

Q. You were familiar with the fact the contract between these two companies provided for a maximum of \$25,000 on one risk, were you not?

A. Yes, sir.

Q. Did you connect up this 50% PML in any way with the fact you were ceded \$50,000 on this particular risk?

A. No connection whatever.

Q. None at all? A. None at all.

Q. You stated you wrote this particular policy in a special way. In just what way did you write it?

A. A special way in this sense: The Union company is not as strong financially as the Northwestern. That is a known fact. The Northwestern

(Testimony of J. M. Legris.)

having retained \$50,000 upon that particular risk the Union could not, in its underwriting absorb a \$50,000 reinsurance as such, so the Union in its underwriting of that risk kept a certain portion of it as its net loss liability, and then reinsured the balance of the amount to protect itself in case a loss occurred.

Q. What were the amounts?

A. The amount of the net retention of the Union was \$15,000.

Q. And that was protected under what kind of a policy?

A. It was protected under an excess of loss of reinsurance, which was based on a net retention amount.

Q. Will you explain the difference between that kind of a policy and a catastrophe reinsurance policy? [15]

Mr. Dumett: What catastrophe reinsurance policy—yours, for instance?

Mr. Cook: Yes. You requested we bring this into court.

The Court: I think any document you ask the witness about should be first marked so the record will show what he is speaking of.

Mr. Cook: We may substitute a copy of this later?

The Court: If both counsel agree to it, you may.

Q. Will you refer to Plaintiff's Exhibit "1" here and see whether or not you are familiar with that type of catastrophe reinsurance contract?

(Testimony of J. M. Legris.)

The Court: We will take a ten-minute recess.

(After recess trial resumed as follows)

Q. (Mr. Cook) Now, Mr. Legris, have you examined plaintiff's Exhibit "1"?

A. I have examined it as much as I could in the short space of time.

Q. Are you familiar with that kind of a catastrophe reinsurance contract? A. I am.

Q. You have known of that kind of a contract from your experience in the insurance business?

A. For a good many years, yes.

Q. And do I understand it to be your contention here that that contract reduced the retention of the Northwestern to \$32,000 on the bridge?

Mr. Dumett: The one he has before him, counsel?

Mr. Cook: Yes.

A. From what I saw of it I would say it would reduce the net retention of the Northwestern. [16]

Q. That is the contention of your company in this law suit, is it not?

A. It is our contention the net retention of the Northwestern was not \$50,000, but \$32,000.

Q. Because of the existence of that contract?

A. Not because of the existence of that contract, because we knew nothing of it until we were told of it.

Q. For what reason do you claim their net retention was reduced to \$32,000?

A. It was reduced to \$32,000 because on the notice of loss, as shown by one of the exhibits, the

(Testimony of J. M. Legris.)

Northwestern stated that the amount of its net loss, prior to excess or—yes, not after excess—or prior excess—what is the wording there?

Q. Which exhibit do you refer to?

A. The exhibit on the loss.

Q. Do you refer to Exhibit “A-6”?

A. This states that the net loss sustained by the reinsured company, which is the Northwestern, after deducting all reinsurance, was \$38,461.54, and a statement prior to excess.

Q. That was dated what?

A. August 21, 1941.

Q. That was long before this litigation and before the dispute arose? A. Yes, sir.

Q. Do you recall having seen the original of this letter dated October 1, 1941, being Defendant’s Exhibit “A-8”? A. Yes, sir.

Q. And will you refer to the last paragraph of that letter in which this matter of the excess is explained to your company? [17] A. Here?

Q. Yes, sir. A. All right.

Q. This paragraph advises your company that: “As matters turned out, of course, the claim was finally compromised for a figure close to 80% of the total insurance and our net loss, after deducting specific reinsurance, was \$38,461.54. Claim under our catastrophe excess contract was \$7,615.39, this being 90% of our net loss in excess of \$30,000.00.

“We trust this fully answers your question, although if there is any further information you would like to have kindly let us know.”

(Testimony of J. M. Legris.)

Do you recall having received that?

A. Yes, sir.

Q. And after the receipt of that letter and that information was when your company took the position that the catastrophe contract which you have now before you is the thing which reduced the Northwestern's retention from \$50,000 to \$32,000, is that not correct? A. Yes, sir.

Q. And we are agreed now that the basis of your company's contention in this case is that this specific contract, Plaintiff's Exhibit "1", is the thing which has reduced our retention from \$50,000 to \$32,000?

A. May I say something on that contract before I reply?

Q. I would like to have your answer first, and you may then explain, if necessary.

A. Of course in a general way I would say yes. It was on the basis of the contract stated to us that our company said that the net retention of the Northwestern was not \$50,000, [18] as stated to us, upon the reinsurance, but rather \$32,000.

Q. But let me ask you a question. Is there anything else besides this contract which you contend has reduced the retention from \$50,000 to \$32,000?

A. There can be nothing else, because that is the only reinsurance cover.

Q. All right; that is what I wanted to know.

Now, with that as a premise, I want you to assume that the amount retained by the Northwestern

(Testimony of J. M. Legris.)

had been \$25,000 instead of \$50,000, and knowing of the existence of this contract, what would be the net retention of the Northwestern?

A. The net retention of the Northwestern would have been \$25,000.

Q. It would have been? A. Yes.

Q. (Mr. Cook) What I am interested in is this, assume that instead of retaining by the Northwestern \$50,000, as we advised you we did, we had retained only \$25,000, and that we had a similar \$25,000 policy on the Lake Washington bridge, and that the same windstorm had wrecked both bridges; what would have been our retention on the Tacoma Narrows bridge?

A. It would have been stated in the statement of loss at \$25,000, and it would have been stated on the other one as \$25,000, and then your catastrophe contract, which called for an amount of loss not in excess of \$32,000, would have come into play, but it would not have disturbed your net retention in the beginning.

Your net retention is what you have in the beginning, [19] and comes in on that particular Tacoma Narrows bridge under that contract.

You gave us \$50,000 net retention, and you knew that if a loss occurred which was in excess of \$32,000 you would recover under that contract, so you had means of telling the reinsuring company that your net retention under that particular line was \$32,000 and not \$50,000.

Q. Suppose that this wind-storm which caused

(Testimony of J. M. Legris.)

this damage, instead of doing the amount it did, damaged that bridge up to 50% only, and the next day an earthquake damaged it the remainder of the 100%, so that it was a total loss, what would be the retention of the Northwestern?

A. The Northwestern's retention should be \$32,000, under a 50% risk.

Q. Under that statement of facts how would this policy come into effect?

A. That policy would not come into effect under those two losses.

Q. And what would be the retention of the Northwestern?

A. The retention of the Northwestern would have been the amount of its loss.

Q. \$50,000?

A. It would have been \$50,000.

Q. Then how prior to the time that a loss is incurred can you tell what your net retention is if you have to consider catastrophe excess?

A. You can always tell what your net retention is when you are assuming a risk as your net retention risk, which has an amount in excess of the net under the catastrophe coverage. [20]

Q. How can you tell that?

A. You can always tell. We have contracts like that in the Union.

Q. You say you can always tell. We have had one example here where you say our retention was \$32,000 because of the specific loss involved here, but had it been two losses separated by a day and

(Testimony of J. M. Legris.)

from different causes, our retention under those facts would have been \$50,000.

A. You mean your loss retention would have been.

Q. Our retention would have been \$50,00, you said?

A. That is the amount of your loss.

Q. And that is the amount of our policy?

A. You mean the amount of your policy—you had two different losses, and having two different losses you would have reported two individual losses, and the Union never would have had any way of telling whether or not actually you were retaining \$50,000 or any other amount.

The only way the Union was able to find out that actually the Northwestern had a net retention other than that stated to us in the underwriting was on that proof of loss, and that proof of loss—

Q. Let us go a little further. Suppose that we write a policy on a dwelling house for \$5,000, and \$2,500 of that is ceded to the Union, and you are advised that the retention of the Northwestern is \$2,500—do you follow me so far? A. Yes, sir.

Q. After that one house burns down completely, there has been a \$5,000 loss, \$2,500 of which is the Northwestern's? A. Yes, sir.

Q. And up to that point we have correctly stated our retention? A. Yes, sir. [21]

Q. Suppose that house was one of say fifty located in a block or two or three blocks, upon which we had similar policies, and all of them

(Testimony of J. M. Legris.)

burned down, what would have been our retention on that particular house?

A. The retention would have been considered—your retention on that, on that particular house, would have continued at \$2,500.

Q. If we had the fifty houses insured with a net retention of \$2,500 on each one, and they all fifty burned, there would be a loss of \$125,000, would there not? A. Yes, sir.

Q. The Northwestern would pay how much of that?

A. The net loss of the Northwestern would have been, under that contract, \$30,000 plus 10% of the excess up to the limit, whatever the amount may be.

Q. Would that then have affected, on the same theory you advance here, the net retention which we reported? A. No, sir.

Q. Why not?

A. Because the net retention in underwriting is not based on aggregate risk. It is based on individual risks, and that is what governs underwriting, on individual risks and nothing else.

And that is why a company, in accepting reinsurance, insists upon knowing the net retention of the ceding company, because that net retention tells the reinsuring company immediately what is the quality of the risk in the judgment of the ceding company, and the reinsuring company, on the basis of that judgment of the ceding company, underwrites [22] itself its reinsurance.

(Testimony of J. M. Legris.)

Q. But does it not also tell or indicate the number of risks involved?

A. It would if so stated, yes.

Q. No, whether stated or not. Assuming there is no statement, and that it comes through after this date on a 50% PML, does that not indicate to you in addition to the desirability of the risk, the number of risks involved? A. No, sir.

Q. Do you in ceding reinsurance tell the number of risks involved?

A. If there are risks involved we tell the number of the risks, because the underwriting is based on the number of risks.

Q. How do you advise of that?

A. That would be under the so-called reinsurance certificate.

Q. Where on the reinsurance certificate does that appear?

A. That would appear most likely in the remarks.

Q. Most likely? Do you not have any usual place for it to appear?

A. Offhand I cannot tell you exactly where it would appear, but it would appear on the reinsurance certificate if there were two individual risks.

Q. Two or more?

A. Two or more considered.

Q. I hand you Plaintiff's Exhibit "2" for identification.

Will you examine that and state whether or not.

(Testimony of J. M. Legris.)

that is a certificate of reinsurance ceded by the defendant to the plaintiff in this case?

A. Yes.

Q. I will ask you to state whether or not that discloses a total retention by the Union of \$127,800 fire and \$71,000 wind? A. It does. [23]

Q. Then what does it disclose under that risk that was ceded by the Union to the Northwestern?

A. The original figures were the total amount of \$141,999 wind, and \$255,600 fire.

Q. Those figures are about double the retention of the Union? A. Yes, sir.

Q. Now what PML does that disclose?

A. 5%.

Q. Is it five or 3%.

A. 5%.

Q. Where besides that 5% PML is there any method of determining the number of risks involved?

A. The net of the reinsurance itself tells the number of risks. This happens to be a reinsurance upon village properties, and village properties are made up of individual units, and this kind of insurance is well known as blanket insurance covering for convenience individual units which could just as well, in an inconvenient way, have had the insurance written on a par policy basis.

Q. I don't like to interrupt you, but my question was where besides the 5% PML is there disclosed the number of risks?

(Testimony of J. M. Legris.)

Mr. Dumett: The witness is explaining and he had not finished his answer.

A. The answer to your question is in the description of the risks covered.

Q. And is that the only place?

Mr. Dumett: Let him finish.

A. Because it says in here "On Buildings" and so on, of the type generally making up village properties, which are individual units.

Q. Any other place, Mr. Legris? [24]

A. I would say not. Not that I can see here.

Q. Is there any place there which discloses the fact that the Union carries catastrophe reinsurance of any kind which would affect your retention of the \$127,000 fire insurance?

A. There is nothing in this certificate, no.

Mr. Dumett: What is that?

A. The answer is no.

Q. (Mr. Cook) Yet you do carry that kind of insurance?

A. We carry catastrophe insurance, yes.

Q. And what are the limits on that?

A. Our general fire business, as stated in the answers our company furnished the court this morning, shows \$100,000 on the general fire business, as a first loss to the Union, before the catastrophe coverage comes into play.

Q. Now considering only that particular policy, the limit of your catastrophe reinsurance started at \$100,000 rather than \$30,000, as in this policy, Plaintiff's Exhibit "1", is that right?

(Testimony of J. M. Legris.)

A. Yes.

Q. So that in this particular form which you reported to us, had you sustained a loss of over \$100,000 your catastrophe policy would have come into play on that date, would it not?

A. It would.

Q. Did you report to us in your retention there the existence of any such policy? A. No, sir.

Q. What other policies besides this \$100,000 policy, do you carry which would affect a large loss on that?

Mr. Dumett: When, at what time?

Q. (Mr. Cook) What is the date of that particular policy? A. July 1, 1939. [25]

Q. As of the date of the issuance of that policy?

A. Will you repeat the question, please?

(Question read.)

On what?

Q. On that policy.

A. What type of loss?

Q. We will consider fire first.

A. Well, the fire, the answer has been given. The limit is \$100,000. The first loss of \$100,000 with a limit of liability of \$300,000.

Q. Was there no other policy of excess insurance in effect at that date which would have reduced a \$25,000 loss under that policy?

A. What kind of a loss?

Q. A fire loss. A. No, sir.

Q. None at all? A. None at all.

Q. The reason I ask that was the fact that on

(Testimony of J. M. Legris.)

this particular bridge insurance you said you had a policy which reduced your loss to \$15,000. Does that refer only to wind?

A. That particular reference of mine is a reference to a contract which applies to individual risks only. It really acts in the nature of pro rata reinsurance only, with this distinction, that before the pro rata reinsurance comes into play the company has to sustain a loss corresponding to the amount of its net retention under the particular reinsurance.

Q. Does that policy apply only to wind, is my question?

A. No. It applies to all risks written by the company.

Q. Included in that risk there are some buildings or units, or whatever they may be called, over \$15,000, are there not?

Mr. Dumett: Are you now leaving the bridge and [26] returning to the units?

Mr. Cook: It is plaintiff's Exhibit "2".

A. Without the schedule I could not tell you that answer. There is no reference to any units there.

Q. You would not be able to tell by looking only at this Exhibit "2"? A. No.

Q. Assuming that there was under this policy one building valued at \$25,000, which was destroyed, and then your second excess policy would have come into play under a loss?

A. No, sir; it would not.

Q. It would not? A. No, sir.

(Testimony of J. M. Legris.)

Q. Why not?

A. It would not come into play because that second contract you refer to is a contract particularly based on a net retention of the company, and before that contract pays anything to the Union upon the loss, the Union's net retention, which is a known fact, has to be exhausted by the loss.

Q. And in this particular case your net retention was what?

A. I think it is stated at 3% at the top and right above the amounts.

Q. Do you mean your net retention is not \$127,000, as shown on here?

A. Our net retention, under the particular policy, which is a policy covering a multitude of risks, is \$127,000.

Q. Where would the 3% come into play?

A. The 3% is 3% of the aggregate coverage under the insurance. The aggregate insurance of the Union under this particular policy is \$4,260,000. 3% of that is \$127,800. [27]

Q. Do I understand before this policy—this second excess policy,—would come into play you would have to pay the full \$127,000?

A. No; the excess of loss contract you are talking about now is not an automatic contract. It is a specific contract that only applies when it is actually used on a particular risk. It is not the general cover contract, but an individual risk contract.

Q. Does it require a specific endorsement for each risk?

(Testimony of J. M. Legris.)

A. It requires a specific endorsement for each risk, and I believe I could show you that. I have something in my papers that would show you just what I mean, but I think my words explain what I mean.

Q. What difference was there between the fire insurance referred to in Exhibit "2" and the wind insurance included in there, as far as reinsurance was concerned?

A. We retained—the amount of wind-storm insurance, as I recall the figures, was 50% of the fire coverage. The net retained by the Union on the wind-storm is, I believe, 50%.

Q. You may refer to it again and tell the court how much wind-storm insurance you retained under Exhibit "2"?

A. We retained—the figure I gave was wrong. We retained \$71,000 of the maximum coverage on wind-storm. There is supposed to be an endorsement of wind-storm here, and I can't find it.

Q. I am interested in the amounts there.

A. Our retained amount was \$71,000 on wind-storm, which would be three per cent of the total amount of wind-storm coverage.

Q. Regardless of the total amount your retention was \$71,000?

A. That is right. [28]

Q. Assume that under that policy there had been a \$50,000 loss from wind, how much would the Union have had to pay?

A. A \$50,000 loss?

Q. Yes, sir.

(Testimony of J. M. Legris.)

A. The Union's loss would have been \$1500.

Q. I see your point. I am mistaken on that. Suppose a loss had been sufficiently large to take up \$50,000 of your \$71,000 retention, how much would you have had to pay? A. \$18,500.

Q. Why would you have had to pay only \$18,500 instead of the full \$50,000?

A. Because the loss would have involved so many of these individual units under this insurance that the catastrophe coverage in the aggregate on the individual units would have come into play.

Q. And would have reimbursed you for all of that in excess of \$18,500? A. Yes, sir.

Q. Where in that daily report to the Northwestern did you disclose that under those circumstances your net retention would have been only \$18,500 instead of \$71,000? A. Nowhere.

Q. Why did you not do it?

A. Because this particular type of coverage is a coverage which is not an individual unit coverage; but is a coverage on a multitude of risks.

Q. The real reason is you could not tell until after a loss whether your excess contract would ever come into play or not, is that not true?

A. That is true.

Q. It would be physically impossible for you to report any [29] other net retention than \$71,000?

A. That is true.

Q. Because you could not determine it until the loss occurred? A. That is right.

Q. And your distinction, as I get your testimony,

(Testimony of J. M. Legris.)

between your situation where you did not report and the Northwestern's ceding to you this bridge insurance, is that you assumed there was one risk instead of more? A. That is right.

Q. That is the only difference in the two cases?

A. Yes, sir.

Q. Now, Mr. Legris, how long has the Union been taking reinsurance from the Northwestern?

A. Within records I have, since 1928. I believe—it may have been prior to that, but I have records since 1928.

Q. At least since 1928? A. Yes, sir.

Q. And there has been during the same time insurance ceded by the Union to the Northwestern?

A. Yes, sir.

Q. Is it not a fact during all that time there have been many limits in excess of your \$25,000 limit covered in your contract ceded to you?

A. Our contract?

Q. In the contract in this case which we were reading here—didn't you hear it—Article 8?

A. Yes, sir; I recall.

Q. Which provides in no event at any one time on one risk shall it exceed \$25,000?

A. Yes, sir; I recall now.

Q. There have been many, many instances in which more than \$25,000 [30] have been ceded to you by the Northwestern?

A. Not without special authority.

Q. Not without special authority?

A. Because under the contract no reinsurance

(Testimony of J. M. Legris.)

could be ceded to the Union in excess of \$25,000 retention on any one risk.

Q. Do you know that positively?

A. That has been looked up in our records and to the best of my knowledge that is so.

Q. How besides the estimated PML, which is put on the report, do you have any way of knowing how many risks there are involved on this insurance that is ceded to you by the Northwestern?

A. The question would not be raised upon reinsurance, unless the amount ceded were in excess of the amount permitted under the contract.

Thereupon Plaintiff's Exhibit "2" was admitted in evidence. The material portions of said Plaintiff's Exhibit "2" are as follows: [31]

~~141,999.~~ W
141,999. W

Begins July 1 '39 Expires July 1 '42 Amt. ~~255,600~~ F.
[Stamped]: 12-25-41 (750) √ 2

Report of Reinsurance Placed by the
Union Mutual Fire Insurance Company (147)
Providence, Rhode Island
with

Northwestern Mutual Fire Association
Seattle, Wash.

For reinsurance on its Policy 01-121

Issued to West Point Manufacturing Company

Var. Locations
of Alabama

and covering in accordance with synopsis or copy of
form attached

[In Pencil]: 263 F

Reinsured Company's rate of Div.		73 W
Class 10-FP	Pro Const	PML 5%
	3%	71,000. W
Reinsured Co. retains on identical property		127,800. F

(Testimony of J. M. Legris.)

Reinsured Co. has net contents same premises

Reinsured Co. has net building same premises

SYNOPSIS OR COPY OF FORM

West Point Manufacturing Company

\$ 4,260,000.00 On all buildings, principally dwelling, garages, schools, grandstands, bandstands, boarding houses, churches, community houses and farm property, including additions, extensions and projections; all equipment appertaining thereto including fences; and all contents, not otherwise insured, including awnings, casts, curiosities, implements, medals, models, patterns, pictures, scientific apparatus, signs, store, office furniture and fixtures, sculpture, tools, while contained in or adjacent to the above mentioned buildings operated and controlled by the assured, and the interest of the assured in and/or legal liability for similar property belonging in whole or in part to others, and held by the assured either sold but not removed, in storage or for repairs or otherwise held, situated on the premises of the assured as described below, this amount to be divided and to apply as follows:

Item	Amount	
1.	\$ 4,256,002.	On all buildings and contents, as described above, constituting the mill village of the assured situate in Fairfax; Langdale; Shawmut; Lanett; Riverdale; West Point Utilization West Point Power Co., Alabama, subject to the following limits of liability for each village:—
		Fairfax \$ 833,363.
		Langdale 894,714.
		Shawmut 704,301.
		Lanett 1,422,373. 1,431,373
		Riverdale 300,171.
		West Point
		Utilization 39,951.
		West Point
		Power Co. 61,129.
		<hr/>
		\$4,256,002.

(Testimony of J. M. Legris.)

2. 3,998. On any other buildings or contents thereof, belonging to the assured and not included in the schedule of property prepared by the assured, or on any newly erected or acquired buildings or contents thereof to apply for an amount not exceeding \$600. on the one story, shingle roof, frame dwelling, situated about 6½ miles south from West Point, Chambers County, Alabama and known as "Smith Farm" and \$500. on any other building. Provided the assured notifies this company within thirty (30) days of the erection or acquiring of said buildings.

\$ 4,260,000. Total

This policy also covers miscellaneous buildings at or near the assured's manufacturing plants or elsewhere in the assured's manufacturing towns, not otherwise insured, but does not cover mill warehouses or sprinklered buildings or any property which is otherwise specifically insured.

It is understood and agreed that any buildings as described in this policy which may be built or acquired by the assured during the term hereof shall be included in this insurance in the same manner as tho they had been specifically described at the time this policy was originally issued and this policy is also extended to include any building material and supplies to be used in the construction of new buildings and shall also cover any contractors interest in buildings being erected or in materials therefore and also contractors tools and equipment being used in the construction of new buildings.

Windstorm Endorsement attached.

(Testimony of J. M. Legris.)

Attached to and forming part of Policy No. 01-121 of the Union Mutual Fire Ins. Co.

Dated: July 1, 1939.

Q. (Mr. Cook): Have you examined Plaintiff's Exhibit "3" for identification? A. Yes.

Q. Will you refer to the first page of that exhibit and tell the Court what it is?

A. This is a certificate of reinsurance placed by the Northwestern with the Union, applying to insurance beginning October 7, 1940, [32] to expire October 7, 1941, showing \$40,000 ceded to the Union known as the Mead and Mount Construction Company, et al, of a town suburban to Denver, Colorado.

Q. Will you refer to Defendant's Exhibit "A-5", which was introduced here, being the certificate of reinsurance covering the Tacoma Narrows bridge, and tell me whether or not those two are on identical forms?

A. Substantially so,—not exactly so.

Q. Defendant's Exhibit "A-5" is a photostatic copy of the form which was sent to the Union, is that not correct? A. Yes, sir.

Q. And Plaintiff's Exhibit "3" contains the carbon copy of copies of similar certificates which are retained by the ceding company, or the Northwestern? A. That is right.

Q. Is that correct? A. That is right.

(Testimony of J. M. Legris.)

Q. In that first certificate what was the Union advised that the net retention of the Northwestern was? A. \$40,000.

Whereupon adjournment was had until December 30, 1942, when the trial was resumed as follows, to-wit:

Q. (Mr. Cook): Mr. Legris, we were discussing last night Plaintiff's Exhibit "3". Will you refer to that again (handing Exhibit "3" to the witness)? The first page of that exhibit cedes to the Union how much insurance? A. \$40,000.

Q. And it advises the Union that the Northwestern retains how much?

A. \$40,000 on the same risk, and \$20,000 on another risk here. [33] I can't quite read the list.

Q. The \$40,000 is fire, you mean?

A. Yes, sir; the \$40,000 is identical to the cession to the Union.

Q. And the PML is what?

A. It is stated at 50%.

Q. What is the first one on?

A. It covers on the three and four story approved fire resistant building, occupied as a residence quarters, A. C. Barracks, Lowry Field, situate East 6th Avenue and Quebec Street, of the suburb to Denver, Colorado.

Q. Is there anything on that sheet with the exception of the estimated PML to indicate whether there is more than one risk involved?

A. No, sir.

(Testimony of J. M. Legris.)

Q. Now refer to the second sheet. What is the amount of insurance ceded there?

A. There are two amounts stated, one is \$40,000 and the other is \$24,444.

Q. On what sort of a risk, fire?

A. It is all on a fire risk.

Q. Both amounts?

A. No. Yes; this is provisional insurance, based no doubt on reports that are periodical, and the—before the \$40,000 is the letter M.

Q. Which would be mean maximum?

A. Yes, sir. And before the amount, \$24,444, is the letter A. The A, to tell you the truth, I don't recognize it. We generally put in the letter P for provisional. What does it mean?

Q. Average? [34]

A. Yes, sir; the same as provisional.

Q. Now, refer to the third sheet there. How much insurance is ceded to the Union by that?

A. \$100,000.

Q. And how much is the Union advised is the Northwestern's retention? A. \$100,000.

Q. And that is on what?

A. That is on all property contained on premises occupied for school purposes and situate in Salt Lake City, Utah.

Q. Now, refer back to No. 3. Counsel says I didn't ask you what that was on—sheet No. 2.

A. That covers maximum of \$810,000, or 30% of the total insurance on the following form, \$2,700,000 on stock contained on premises situate on

(Testimony of J. M. Legris.)

premises—on premises situate on premises on North 7th Street between North F Street and American River, and known as Main Plant premises, Sacramento, California.

Q. Is there anything on that sheet excepting the estimated PML to indicate whether or not there is more than one risk involved? A. Yes.

Q. What?

A. There is a statement below the description of the property which says \$100,000 at any one location", and immediately below that it says "Provisional insurance", which would indicate to the underwriter of this reinsurance that more risks might be involved than just the one risk at the one location. That is provisional insurance. That is well known to underwriters.

Q. (Mr. Cook): Refer to No. 3. Is there anything on that sheet [35] to indicate there is more than one risk involved, except the estimated PML?

A. Nothing.

The Court: You mean risk on property other than that covered by the known and expressly accepted risk?

Mr. Cook: No. A risk, as we use the word, is any one part of a property which is subject, in the judgment of the underwriter, to one loss.

Q. Is that not a fair statement of that, Mr. Legris? A. That is fair enough, yes, sir.

Q. In other words, one unit may be considered, in the judgment of the underwriter, as two risks, is that true? A. Yes, sir.

(Testimony of J. M. Legris.)

Q. Because of its construction and so forth?

A. Because of certain peculiar things around the building, like a separate wall or a fire wall, or there may be a division between the risks, like an alley, or something like that.

Q. That is right. I might state that ties into this case because this bridge was indicated as two risks, when the judgment of the underwriter said that the bridge, as such, constituted two insurable risks rather than one risk, that would be destroyed from one cause. Now, refer to sheet No. 4. Let me first ask you on No. 3, what is the estimated PML on No. 3? A. 11%.

Q. And you were ceded \$100,000 on that?

A. We were.

Q. All right; now No. 4 covers what—what is the PML on sheet No. 2? A. 30%.

Q. All right; now sheet No. 4 ceded you how much insurance? A. \$50,000. [36]

Q. And the estimated PML? A. 25%.

Q. And the property?

A. The Washington Toll Bridge Authority et al on the Lake Washington bridge, described further as the Lake Washington bridge and approaches connecting Seattle and Mercer Island in the State of Washington.

Q. Is there anything on that except the PML to indicate there is more than one risk involved?

A. There is not.

Q. I think I can cover the balance of those with one question, possibly. In examining that document

(Testimony of J. M. Legris.)

there is it not true that all of those dailies cede to you more than the \$25,000 limit of insurance, as provided in your reinsurance contract?

A. Yes, sir.

Q. And is it not also true that taking into consideration the PML the risk which you assumed in each instance is less than the \$25,000 limit?

A. That is not so.

Q. On which one is that not correct?

A. There is one certificate of reinsurance here showing \$40,000 to the Union on a net retention of the Northwestern at \$200,000, with one other insurance of \$50,000 under use and occupancy, on the California Toll Bridge Authority, et al, which is the bridge spanning San Francisco Bay between San Francisco and Oakland, California, and there is no PML stated on the certificate.

Q. There is no PML there?

A. That is right.

Q. Do you know whether there may have been some special corre- [37] spondence about that special risk or not?

A. I assume there no doubt was, but I don't recall.

Q. My question, however, is correct as to all the other dailies shown in that exhibit?

A. As to all the others it appears so, yes.

Q. Mr. Legris, is it not a fact that in the many years these two companies have been dealing together, the only method used of indicating whether

(Testimony of J. M. Legris.)

more than one risk was involved was by the use of this PML?

A. I would not say so. That is not my understanding of the PML.

Q. It is not? A. No.

Q. It is part of your duties in your position with the Union to handle these reports as they come in? A. Not presently, no.

Q. May I ask you if it is not a fact that there is no—it is understood there is no risk involved greater than the estimated PML?

A. In those sheets?

Q. In those sheets or in your other dealings with the company?

A. I believe that is so, yes.

Q. In other words, the method of the two companies doing business was on the basis that the estimated PML would not exceed the one risk limit contained in your policy—in your contract—I should say?

A. Will you please read that question?

(Last question read.)

I would not say that would be so.

Q. Did you not state that no one risk would exceed the PML percentage?

A. If I did I did not quite—I did not answer clearly your question. [38]

The Court: The preceding question?

A. Yes.

The Court: You may correct your answer.

(Testimony of J. M. Legris.)

Q. (Mr. Cook) Explain the situation. Possibly my questions are not clear.

A. I believe the questions that are being put to me now on the PML are not being put to me on the real meaning of PML. PML, in underwriting, means what the three letters stand for, the probable maximum loss in the risk involved, and that, of course, governs the underwriting. It gives the quality of the risk, and it enables the two companies—the ceding company and the accepting company—the reinsuring company—to determine whether or not the two companies are agreeable to take a smaller amount or a larger amount as a net retained line, in the case of the ceding company, and as a line of reinsurance in the case of the accepting company.

Q. May I interrupt? In other words, the PML determines the amount of insurance you will put on any one policy, is that right?

A. The PML determines the amount of the retention by the ceding company on any one risk, because the PML, by itself—by its express percentage—says the quality of the risk is a certain quality, and what in the judgment of the underwriter of the ceding company it is expected a loss may be under that particular risk.

Q. You stated yesterday that the net loss—or your loss—the Union's loss on this bridge—was reduced by an excess policy which you carried to \$15,000, did you not? A. That is right.

Q. Now that policy required, as you understand,

(Testimony of J. M. Legris.)

the specific [39] endorsement for each risk assumed under it? A. Yes, sir.

Q. In accepting reinsurance ceded to you by the Northwestern, where the net retention on one risk is less than \$30,000, do you consider or take into account at all the existence of this catastrophe reinsurance?

A. First, without any knowledge of any catastrophe coverage, the company's policy would be to accept on its face the net retention stated by the ceding company as its actual net retention, subject to a loss in that amount to the company as such.

With knowledge, however, as obtained after this Tacoma Narrows bridge loss, that the Northwestern has a catastrophe coverage with a first loss liability of \$30,000, plus a 10% addition up to a certain amount, our company would not accept, except upon special authority, the cession of the Northwestern on the basis of a net retention amount which would be greater than the known net retained line under the catastrophe coverage.

Q. Mr. Legris, you said yesterday the Northwestern was a much stronger company than the Union, financially, I mean? A. Yes, sir.

Q. Where did you receive that information?

A. From known financial reports. I see a book on the table there, Best's Fire Insurance Report.

Q. That is a recognized publication in the insurance world, is it not?

A. I believe so. It is referred to as a statistical report.

(Testimony of J. M. Legris.)

Q. A statistical report on all companies doing business in the United States? [40]

A. Practically so; reporting to that organization.

Q. How long have you known of the existence of that book? A. A good many years.

Q. How many years?

A. I would say over twenty.

Q. Over twenty years, and you have occasion to refer to it from time to time in your business?

A. Yes, sir.

Q. And it is in the office of practically all insurance companies in the United States?

A. I would say so.

Q. And it is in your office? A. Yes, sir.

Q. And has been for years? A. Yes, sir.

Q. And has been referred to by you and other officers of your company many times?

A. Yes, sir.

Q. Have you ever looked at the report of the Northwestern in that book?

A. I don't recall of having looked at that report for quite a while.

Q. For how long? A. Many years.

Q. Do you recall any other officer of your company ever looked at or referred to the report of the Northwestern contained in Best's Insurance Reporting, Fire & Marine?

A. I wouldn't know.

Q. Will you refer to page 991 of that book for

(Testimony of J. M. Legris.)

1940 and read to the court that paragraph (indicating)?

A. "The association has very satisfactory arrangements under [41] reinsurance treaties for reinsuring excess lines, besides it carries a first excess catastrophe coverage for \$200,000, applicable to all hazards in excess of \$30,000, and the second excess over \$250,000, up to \$500,000, with a group of American reinsurers and London Lloyds."

Q. Do you mean to tell the Court that none of the officers of your company knew the Northwestern carried this excess policy, Plaintiff's Exhibit "1" for identification?

A. For myself I would say I didn't know.

Q. You didn't know.

A. And I could not tell for the others.

Q. And the only reason you would not know is because you did not refer to this book or to the books which gave that information.

A. That would be the reason as long as you have shown me the reference.

Q. That is a matter which is subject to be common knowledge to anybody in the business, is it not?

A. What?

Q. The fact they carry this specific policy.

A. I would not necessarily say that is so. That particular book is a book of reference, and while it is true that it may be in our office I would not say that we necessarily read all the script matter that follows or that may apply to any particular

(Testimony of J. M. Legris.)

company, or even the figures applying to that particular company.

Q. There is nothing to prevent you from getting that information.

A. There would be nothing to prevent us from reading it.

Q. Do you mean to testify here that the Union Mutual did not know that the Northwestern carried this policy, Plaintiff's Exhibit "1"?

A. For myself—— [42]

Q. I am not talking about you. I am talking about the defendant in this case, to you, as an officer of it.

A. I would say so.

Q. That they didn't know a thing about it?

A. In the Home Office of our company the underwriting department of our company did not know about that.

Q. And they have done business with the Northwestern for how many years?

A. Within the knowledge of the facts I have, since 1928, anyway.

Q. And this book has been published and you have been familiar with it for over twenty years?

A. Yes.

Mr. Dumett: May I ask a question. This book covers 1940 or 1941. It was published in 1941.

The Witness: I was going to say that the book applies to annual statements of companies as of December 31, 1939, and this book, which is the 1940 issue, I would recognize this book to have been

(Testimony of J. M. Legris.)

issued by Best Publications in May, 1940, approximately at that time.

A. It is a book of reference for those who may want to refer to it for the period 1940, going into 1941, but upon information obtained as of December 31, 1939.

Q. (Mr. Cook) You say it was in the hands of the insurance trade in May, 1940?

A. I believe that is about the time it comes in.

Q. I started to ask you whether you had ever seen any certificate ceding reinsurance to your company, which disclosed the fact that the ceding company carried a catastrophe excess policy?

A. I don't recall seeing any.

Q. You never have? A. No, sir. [43]

Q. Referring again to this matter of public knowledge of the existence of this particular catastrophe policy, you were with an insurance department before you went with the insurance department of the State of Connecticut, I understand?

A. Rhode Island.

Q. Yes, Rhode Island; prior to the time you became associated with this defendant company?

A. Yes, sir.

Q. Is it not required the insurance companies file with the insurance department of certain states certain annual statements? A. Yes, sir.

Q. And those are public documents, are they not? A. Yes, sir.

Q. Open to the public for inspection?

A. Yes, sir.

Q. And do not those documents filed with the

(Testimony of J. M. Legris.)

Insurance Commissioner of each state disclose what catastrophe excess coverage the companies carry?

A. It is over twenty years since I have been with the State Department—twelve years, I beg pardon,—and the annual statement form which is used for the filing of annual reports contains so many items that to answer your question correctly I really would need to see the form.

Q. But your own company files its form?

A. Yes, sir.

Q. Are they not filed with you?

A. I haven't prepared the annual statement form in three years now.

Q. I asked you if they were not filed with you?

A. I am familiar with the annual statement forms, yes sir. [44]

Q. And those are forms required by law to be filed with the Insurance Department?

A. Yes, sir.

Q. And do not the annual statements which your company files disclose the existence of these excess policies which you carry?

A. I don't believe so.

Q. You don't believe so?

A. Not our statement.

Q. How about the reports made by the examiners when they examine insurance companies?

A. As a rule they report these contracts, but not always.

Q. Where are those reports kept after they are made?

(Testimony of J. M. Legris.)

A. Within the State Departments. Within the home department of the home company, of the company of the particular location.

Q. And those are matters of public record?

A. Yes, sir.

Q. And they will disclose the existence of these catastrophe policies?

A. If reported in the reports, yes sir.

Q. Do you know what the premium was on this policy that was paid to the Union by the Northwestern?

Q. (Mr. Cook) Mr. Legris, my last question was the amount of the premium paid by the plaintiff to the defendant on the policy in issue here.

A. \$600.00.

Q. And what was the rate per thousands of insurance? A. \$12.00 per thousand.

Q. That premium was paid to the defendant?

A. I would say so because accounts between—for reinsurance—are rendered on a monthly basis and they are payable within [45] sixty days after the accounts are rendered.

Mr. Dumett: The witness is answering to the best of his knowledge, but I am so certain it was paid I will admit it. I think that is satisfactory.

The Witness: That is very satisfactory.

Q. (Mr. Cook) Has any portion of that \$600.00 ever been returned to the plaintiff?

A. No, sir.

Q. Has it ever been tendered to the plaintiff?

(Testimony of J. M. Legris.)

A. The Northwestern shortly after the loss issued an endorsement cancelling the certificate of reinsurance because of the loss, and on that endorsement it stated—"no return premium."

Q. My question was—you say the premium has been paid, has any portion of the \$600.00 ever been tendered back to the Northwestern? A. No.

Q. That is all. There is one further question, if I may reopen, Your Honor, merely in reference to the excerpt which you read from the Best Reports, will you state whether or not that excerpt appears under the heading "Management and representation?" A. It does.

Mr. Cook: That is all. [46]

Mr. Dumett: On that point I would like to say before asking a few questions on redirect examination, that with respect to the premium that was paid the Union by the Northwestern on this reinsurance cession, I have admitted that that premium had been paid because I am certain it has.

We have tendered and actually paid to the Northwestern the amount which we admit is due from us to the Northwestern under the reinsurance contract. We have not been able to determine, however, to date and will not be able to determine until the court's final decision, what the final amount of the premium due us may be; therefore, we have not paid back to the Northwestern any portion of that premium to which it might equitably be entitled, if it should be ultimately held by the court the actual amount of retention was \$32,000 rather

(Testimony of J. M. Legris.)

than \$50,000, and therefore the Union is only liable on the basis of \$32,000.00.

We wish in all respects to be fair in the matter, and if it should be determined in accordance with our contention that the actual liability was on the basis of \$32,000 rather than \$50,000, we would then not only be willing but we would ask the Court to make such an allowance, to provide in this decree that such portion of the premium as might be deemed to be unearned should be returned to the Northwestern.

The basic reinsurance contract says in the event a larger amount is stated by Northwestern as its net retention than its actual retention, the only adjustment they should be able to get is to reduce the liability of the Union from the higher figure to the lower figure, and it says nothing about returning premium, and under [46a] the contract I don't think there is an obligation to return it, but in spite of that we offer to return such portion of the premium that may be unearned as determined by the Court, and we concede the Northwestern would be entitled to it despite the strict letter of the contract. [46b]

Redirect Examination

Q. (Mr. Dumett) Mr. Legris, if you will turn to Plaintiff's Exhibit "1" for a moment for reference, I believe Plaintiff's Exhibit "1" is the excess catastrophe reinsurance contract which the Northwestern had at the time of its cession of reinsurance to your company, is it not?

(Testimony of J. M. Legris.)

A. Yes, sir. This Exhibit "1", it is noted on the back as the Northwestern's catastrophe cover, first excess. [46c]

Q. That identifies the exhibit. Now, counsel asked you on cross examination whether that contract, Plaintiff's Exhibit "1", was identical with or the same as a retrocession contract, by virtue of which your company reinsured part of its risk, and I believe your answer was they were not identical? A. That is right.

Q. Are they similar at all?

A. Well, these contracts which cover catastrophe reinsurance, or excessive loss reinsurance, actually when you look at them they all look alike, and the only way you can actually determine how they are different is by comparing the provisions of the various contracts, and then you know what the contract covers.

One contract may differ in one thing or in one way, and another contract may not differ as to the same thing, depending on the demands of the respective companies.

Q. Having made that check as far as time allowed, what would you say as to the similarity or lack of similarity of Exhibit "1" with reinsurance contracts you had?

A. That covered our reinsurance under the cession of the Northwestern under the Tacoma Narrows bridge?

Q. That is right.

(Testimony of J. M. Legris.)

A. I would say offhand that the contracts are different.

Q. Now will you refer to what I think is clause No. 6 in that Plaintiff's Exhibit "1", and I think you will find that is the clause that refers to the liability under the policy, starting out "the amount of loss in excess of liability"? A. Yes, sir.

Q. Will you read it?

A. It is a long clause. I can read it if you want me to.

Q. I wanted the clause that refers to the retained net lines.

A. The clause reads as follows, in the first three lines: [47] "The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate net loss of the reinsured company on its net retained lines only." And there is a semi-colon and the clause continues quite a number of lines following that.

Q. That is sufficient for my present purposes. Now the basis of the amount of loss then would be contained in that clause you have read, would it not? A. I would say so, yes.

Q. Under the provisions of that Plaintiff's Exhibit "1" which you just read, and from the information which you have regarding it, what would be the net retained line of the Northwestern on the Tacoma Narrows bridge that would be involved in the present suit?

Mr. Cook: I object to that. That is asking for

(Testimony of J. M. Legris.)

the conclusion of the witness, a conclusion which the court is to find. That is the ultimate fact.

Q. Having that clause in the contract before you, and having before you the reinsurance contract between the Northwestern and the Union, which has been introduced in evidence here, and having before you the telegrams and certificates under which the Northwestern actually ceded the insurance to you, could you, as an expert on insurance, compute the actual net retention of the Northwestern on that bridge, with respect to any loss occurring from any catastrophe?

A. I believe I could, yes.

Q. What would it be—how would you do it?

A. Under the Tacoma Narrows bridge reinsurance to the Union the Northwestern stated to the Union that its net retention was \$50,000. That \$50,000 is an amount in excess of the first loss of \$30,000 provided for in this catastrophe coverage I [48] have before me, Exhibit "1", and that being so from the \$50,000 you would first deduct the first loss of \$30,000, which would leave the amount of \$20,000. Then from the contract the reinsurance covers 90% of that excess of \$20,000, and leaves a liability to the Northwestern of 10%; 10% of \$20,000 is \$2,000, which added to the first loss of \$30,000 shows a net retained line, as I would understand it from this contract, to be \$32,000.

Q. Now will you turn to Plaintiff's Exhibit "2". Plaintiff's Exhibit "2", I believe, is the certificate from the Union to the Northwestern ceding

(Testimony of J. M. Legris.)

certain reinsurance which you referred to as some villages down in the southern states, is that right?

A. Yes, sir. It is a report of reinsurance placed by the Union with the Northwestern covering properties of the West Point Manufacturing Company in various locations in the State of Alabama.

Q. Referring to that exhibit, if you need to, what is the coverage stated in that certificate of reinsurance? Can you analyze it briefly.

A. Yes, sir. The principal coverage—there are two items, and I will just refer briefly to the first item, which is in the amount of \$4,256,200, the second item being rather immaterial, in the amount of \$3998.00.

The coverage under this form is upon all buildings of the assured, consisting principally of dwellings, garages, schools, grandstand, and in fact all of their other structures located in a number of villages that are stated under Item 1, and these villages all have extended against their respective means limits of liability applying to the various villages.

I beg pardon. They are not all villages. There are [49] five villages and two properties that are known one as West Point Utilization, and the other one West Point Power Company. The five villages are known as Fairfax, with a limit of liability of \$833,363.00; the second valuation is a village known as Langsdale, with a limit of liability of \$894,714.00—

Q. By the way, if I may interrupt you. I will

(Testimony of J. M. Legris.)

shorten it as much as possible. I don't think I will ask you for all the details on that, but generally speaking is there a figure showing the liability as to each village?

A. There is a gross figure showing the liability as to each of the five villages and also figures showing the liability as to each of the other two properties.

Q. That is sufficient for my present purposes—unless there is something else there that you want to add. A. No.

Q. What is that type of insurance represented by that certificate covering these buildings commonly known as?

A. It is commonly known as blanket insurance.

Q. Blanket insurance is briefly what?

A. Blanket insurance, as I stated yesterday when I was talking about this certificate, is an insurance of convenience to cover, under one insurance policy, one or more risks, and the benefit of blanket insurance is to preclude the issuing—either the issuing of so many policies as there may be risks involved in the blanket insurance, or to preclude the scheduling of all of the individual risks covered under the blanket insurance with individual amounts of insurance applying to each of such risks.

Q. In that type of policy such as the one before you, is there any scheduling of the individual risk showing the individual insurance companies covering that risk? [50]

(Testimony of J. M. Legris.)

A. The form I have before me does not show anything but blanket amounts applying to the five villages and to the two other properties.

Q. In the exhibit before you, Exhibit "2", there are a number of structures involved, separate structures?

A. Necessarily there would be. It covers under item I, which is the principal item referred to, all buildings and contents of the five villages mentioned, and the two other types of properties, so it just necessarily follows that there are many structures with seven groups of properties involved in the coverage.

Q. In a case like that where you have a blanket reinsurance coverage, is it the practice for the direct insurer to issue separate policies on many of those individuals risks involved in the blanket?

A. No. Separate policies are not issued when you have a blanket coverage, unless possibly by law the coverage being in different states would require a so-called underwriting policy in some one state named in the coverage.

Q. Now as to the PML, or probable maximum loss, which has been referred to several times in the cross examination, I will ask you to assume a building in the City of Seattle in the center of the city with high fire protection, and another identical building outside the city limits remote from fire protection, the buildings are identical, could you have a different probable maximum loss on those two buildings, though identical?

(Testimony of J. M. Legris.)

A. We certainly could.

Q. For what reason?

A. Because the one risk in the city of Seattle where no doubt there is fine fire protection, would not be exposed normally [51] to a great loss, and so the probable maximum loss on that building would be less in amount than on the other building located in a community or somewhere where no fire protection might be had.

In that case, in the second case, the building located outside of fire protection, in case of a loss it would necessarily—not necessarily—but would no doubt be exposed to a much larger loss than the first property, and so the probable maximum loss amounts under the two risks would certainly be different in underwriting practice.

Q. And would that be true even though we assume each of these buildings constitutes but a single individual risk?

A. They surely would constitute a single risk.

Q. Now counsel has interrogated you regarding this book of Mr. Best, Best's Insurance Reports. Are you familiar with the method of the getting of data for that book?

A. I am.

Q. What is the practice?

A. The general practice of the Best management is to send out to the companies each year a request for the information that is published. The companies—at least our company, sends out the information so far as the annual statement is concerned in two ways. We furnish Best management an exact copy

(Testimony of J. M. Legris.)

of the annual statement on file with the various states where we are licensed to do business, and in addition we complete for Best on a form submitted by them the figures wanted that are published in the financial statements at the top of the reference to any one particular company.

Then there is a lot of script, written date, given out to Best. I would say at least from the Union's experience that [52] it is the company itself which writes out the script and sends it on to Best, and the management of Best's very seldom, within my knowledge, finds fault with anything written, and they reproduce what the company sends out.

The Court: You mean by that that your company acts as a kind of an editor for the publisher of Best's?

A. Yes, sir. The article written, for example, on the Union in that book, is the article that has been written up by our own management.

The Court: What about the articles appearing concerning other insurers?

A. These other insurers no doubt do the same thing the Union does with respect to their own affairs.

The Court: Before your last answer I was applying your editing too broadly, as applying to other companies other than yours, but you do not mean to give that impression?

A. No, sir.

Q. (Mr. Dumett) What has been the practice as to your company when it is passing upon the

(Testimony of J. M. Legris.)

question of whether it will authorize a particular insurance? Does it consult Best's book on that point?

A. No, sir; not at all.

Q. What does it consult or refer to?

A. The reinsurance received is analyzed on the face of the information in the particular binder or certificate of reinsurance or daily reports—so-called—and if everything is correct on that certificate, in the judgment of the underwriting department of our company, why that is all there is to it.

That certificate is sent through the regular routine of statistics and accounting and then filed and forgotten, until [53] it is either taken out for a loss or for an endorsement or because it has expired.

Q. As to net retention?

A. As to net retention a check-up is made to see whether or not the net retention stated is——

Q. Stated by whom?

A. Stated by the ceding company—is within the automatic amount permitted under the reinsurance contract or as may have been approved by some primary authority.

Mr. Dumett: I believe that is all, counsel.

Recross Examination

By Mr. Cook:

Q. You say your company accepts reinsurance solely on the fact of the certificate that comes in and the information that it discloses?

(Testimony of J. M. Legris.)

A. On regular reinsurance, yes, sir.

Q. Would you accept reinsurance from a brand new company you had never heard of before without making some investigation of it?

A. No; because a brand new company would not cede reinsurance to us, except upon a primary reinsurance contract having been presented for the acceptance of such reinsurance.

Q. And when a reinsurance contract is negotiated with another company, a very thorough investigation of that company is made, is it not?

A. I would say yes.

Q. And not only as to its financial condition and financial stability but as to its excess coverage?

A. No.

Q. You don't pay any attention to that?

A. No, sir. I have prepared personally since 1930 a great [54] number of reinsurance contracts in our office, and I actually do not recall a single time where in the preparation of a reinsurance contract I referred to any book giving information on that particular company.

Q. That was not my question. Apparently you misunderstood me. I said your investigation also embraced the existence of excess coverage, would it not? A. It would not.

Q. Would that be for the reason you are not interested in what excess coverage a company ceding insurance to you may carry?

A. It is really because of the confidence we have in the company we propose to do business with.

(Testimony of J. M. Legris.)

Q. Where do you secure the information upon which that confidence is based?

A. The information is most generally, and I would say practically generally, based on personal visitations of some officer of the company to the company it is going to have a reinsurance contract with, or that other company visits our own office, and things are talked about and the matter of how much business shall be produced by such contact work is analyzed thoroughly, and at that time the question of the financial stability of the company is looked into.

Q. Isn't one of the most important features of the financial stability of an insurance company the type of catastrophe or excess protection it carries?

A. It is one of the very important factors, yes.

Q. And that is one of the factors which you investigate when you negotiate a reinsurance contract, is it not?

A. We do not.

Q. You do not?

A. We do not investigate the matter of catastrophe reinsurance [55] at any time another company may have.

Q. Although you say it is the one of the most important factors affecting the financial stability of the company?

A. Yes, sir. But it affects the stability of that particular company. As a reinsurer we only deal with individual items of reinsurance, and it is those items we protect ourselves against. We are not protecting the other company.

(Testimony of J. M. Legris.)

Q. Well, is that same thing true with companies to which you cede reinsurance?

A. I don't know. I couldn't answer for the other companies, what they do.

Q. I am speaking of what you do with companies to whom you cede reinsurance.

A. The principal thing we do with those companies is to check up on their financial stability.

Q. Well, in the companies to whom you cede reinsurance, when you investigate their financial responsibility do you mean to say you pay no attention to catastrophe or excess coverage they may carry?

A. In all the years I have prepared reinsurance contracts that is one thing I have never checked up.

Q. Although you say it is a very important part of their financial stability?

A. Yes, sir. And I will repeat it.

Q. Do you know whether any other officer of your company did—you have limited your answers to yourself as an individual, and I am now speaking of you as a company and not as an individual—does your company make such an investigation?

A. I would say no. Because in the—may I qualify?

Mr. Dumett: You may if you wish.

A. And I know that would be "no" because in the last few years [56] when we have entered into new reinsurance contracts it has been my privilege, being the one entrusted with the writing of the contracts, to sit in on the conferences where all

(Testimony of J. M. Legris.)

the officers interested would talk over the situation, and I don't recall in any of those conferences any one talking particularly about catastrophe coverages that the company we were going to deal with might have had.

Q. Is the reason for that because you are not interested in what catastrophe coverage they carry?

A. The answer possibly is this, that we do know from our own experience that catastrophe coverages have their value, and we have confidence when we find the financial stability of a company is of the type we want, that that company is financially strong, because it has safeguarded itself with the usual safeguards of catastrophe coverage.

Q. In other words, even without investigation you know that these strong companies do carry covers of that kind? A. Right.

Q. Do you not? A. Yes.

Q. And you knew the Northwestern carried one?

A. I would say the Northwestern being a financially strong company, in which we have confidence, would normally, like we were doing, carry catastrophe insurance.

Q. And you know they have carried it for the thirteen or fourteen years you have been doing business with them?

A. I would assume we knew it, because it is a common practice.

Q. You told counsel you could compute net retention of the Northwestern purely on the basis of the telegrams and the daily reports and that catas-

(Testimony of J. M. Legris.)

trophe contract, plaintiff's Exhibit "1"; is that right? [57]

A. And other information.

Q. What other information would you use in computing it?

A. There was a letter—I cannot recall which exhibit it was—that was referred to me yesterday, in which the basis of the catastrophe coverage was stated, that it was a first loss of \$30,000—

Q. That appears in the contract itself, Plaintiff's Exhibit "1"? A. Yes, sir.

Q. That appears in there? A. Yes, sir.

Q. And from those documents you can figure that in July, 1940, when this insurance was ceded to you, that the retention of the Northwestern was only \$32,000? A. I would say yes.

Q. Now, Mr. Legris, I want you to assume that instead of the loss which did occur on that bridge there were five separate losses, amounting to \$10,000 each, how much would the Northwestern have been called upon to pay itself under that policy?

Q. Do you understand the question?

A. No.

Q. Assuming there were five separate losses from five different causes of \$10,000 each, so far as the retention of the Northwestern is concerned what would *be* the Northwestern have been called upon to pay?

Mr. Dumett: Do you mean five losses at different times?

Mr. Cook: Different times from different causes during which the policy is in effect.

(Testimony of J. M. Legris.)

A. You are talking, of course, of several risks.

Q. I am talking of the Tacoma Narrows bridge having five different separate losses at five different times from five separate causes, during the time this policy is in effect. [58] How much would they have to pay?

Mr. Dumett: The Northwestern?

Mr. Cook: The Northwestern alone.

A. The Northwestern alone, under the five losses, being separate losses, would have to pay each time the amount of \$10,000.

Q. In other words, they would pay \$50,000?

A. Right.

Q. On a net retention of \$32,000 worth of coverage?

A. Yes, sir.

Q. You say "yes". How could they pay more than their retained coverage?

A. If their retained coverage applied on a single loss—a retained coverage means every time there is a loss the retained coverage acts. If you have a—take the Tacoma Narrows bridge policy, which has been stated at a net retention of \$50,000—we will assume it is \$50,000. There is this excess coverage which states that on any one loss the liability of the Northwestern on that risk shall be \$30,000 plus the 10%, but it is under any one loss, and if more losses occur—if more losses occur, the same reasoning applies to each loss, and that is common insurance practice.

The Court: For instance, would it be the same with ordinary automobile liability, and would not

(Testimony of J. M. Legris.)

the same principal apply there if you had a \$10,000 limit covering one automobile against liability in a single accident, if on one occasion you had a \$5,000 loss and the insurer was called upon to cover that, and then if a month later you had a \$6,000 loss, would that \$6,000 loss be protected to the full limit of the policy, notwithstanding the payment under the first loss?

A. Provided the first loss of \$5,000 were reinstated [59] upon the loss to bring the policy back to its face value again, and that is done regularly in insurance.

Q. (Mr. Cook) Do you not come right back to the point under your theory that you cannot determine the net retention until after the loss has occurred?

A. No, I don't agree with that. You can always determine it when you have the amount——

Q. You can determine it this way you mean——

Mr. Dumett: I don't think he finished the answer. Had you? A. No.

Mr. Cook: All right; go ahead.

A. Upon an individual risk, as in the case of the Tacoma Narrows bridge, under which the Northwestern stated it retained \$50,000 on that one risk, the Northwestern knew at the very beginning of the insurance that it was subject on that one risk upon the happening of only one loss, to no more than a first loss of \$30,000 plus 10% of the excess over \$30,000 up to \$50,000, or \$2,000, making an aggregate of \$32,000, and that is all the Northwes-

(Testimony of J. M. Legris.)

tern was exposed to upon a total loss, the amount of \$32,000, and it knew it at the time of issuing the policy upon that one risk.

Q. You interjected the words in the answer "Assuming it was a total loss"?

A. That is the way you figure net retention. You always figure net retention on the basis of a total loss.

Q. But if you have five separate losses you pay \$18,000 more than you retain?

A. You would not in the case—although they would pay \$10,000 in the case you stated, I assumed, as I told the Court here, there would be between the losses the reinstatement of the [60] amount of insurance, which is the normal practice with all insurance companies.

Q. If the \$50,000 they retained is only the \$50,000 they pay out there would be no reinstatement?

A. Oh, yes. When there is a loss you file a new policy automatically, under the insurance policy, in the amount of insurance reduced by the amount of the loss.

Q. Would it be a reduction of \$10,000 at a time until the full \$50,000 were paid?

A. Yes, sir.

Q. On the first retention of \$32,000?

A. Yes, sir.

Mr. Cook: That is all.

Mr. Dumett: That is all. That is the defendant's case.

The Court: Defendant rests.

PLAINTIFF'S CASE

KARL P. BLAISE,

called as a Witness by the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cook:

Q. You may state your name, please.

A. Carl P. Blaise.

Q. Where do you reside?

A. At Cedar Rapids, Iowa.

Q. You have resided there how long?

A. Since January, 1929.

Q. In what business are you engaged?

A. Fire insurance business.

Q. Associated with what company? [61]

A. The Inter-Ocean Reinsurance Company.

Q. Prior to your becoming connected with that company what work did you follow?

A. I began the insurance business in 1914 with the State Department of the State of Iowa, and served there as general clerk, fee clerk, chief clerk, examiner and chief examiner, and served from 1914 until 1925, with the exception of a year in the service over seas, and I was then associated as general auditor with a fire insurance company and a casualty and surety company, from 1925 to 1929, when I joined the Inter-Ocean Reinsurance Company, in the capacity of assistant secretary.

(Testimony of Karl P. Blaise.)

In 1932 I was made vice president and secretary and have continued in that capacity up to the present time.

Q. What is the nature of your work with the Inter-Ocean reinsurance Company?

A. In addition to the usual executive duties it consists largely in the contact and negotiation and issuance of reinsurance treaties.

Q. With other companies?

A. With other companies.

Q. Do I understand the business of your company is limited entirely to reinsurance?

A. That is correct.

Q. You don't write any primary coverage yourself?

A. No, sir.

Q. How many companies at the present time does your company write reinsurance for?

A. We carry at the present time eighty-eight catastrophe contracts, covering fifty-five companies, catastrophe contracts covering different special hazards. Those are contracts originated by our own company. We likewise participate in [62] eighty-three contracts by way of reinsurance on contracts originated by other companies. We also carry eighty-six contracts of pro rata reinsurance covering fifty-five companies.

Q. Now that we may be clear on that, when you speak of pro rata reinsurance you speak of the kind involved here in this case, where the Northwestern ceded \$50,000 to the Union?

A. That is correct.

(Testimony of Karl P. Blaise.)

Q. That is known as reinsurance?

A. That is correct.

Q. And the other contracts which you mentioned are catastrophe excess contracts?

A. That is correct.

Q. Will you state to the court what, in insurance language, is meant by the term "net retention", or, as in this contract, an amount retained net without reinsurance at its own risk and liability on one specific property?

Mr. Dumett: We wish to interpose an objection to that question, that is directed to the same point, on the grounds previously stated, but which I will restate. This query asks the witness what is meant by a clause, which we submit is written in plain, ordinary English in the contract, and is not subject to interpretation or construction by either the opinion of experts or by custom or usage, and we object to the line of inquiry on the ground it is irrelevant, immaterial and incompetent, beyond any issue in the case, beyond any pleading in the case, because the suit is on the contract. [63]

The Court: In saying "net without reinsurance" it explains itself, does it not, Mr. Cook? What do you suppose those words "without reinsurance by the reinsured company at its own risk and liability", what do you suppose they were put in there for if it was not to explain "retained net"?

Mr. Cook: That is what they do explain.

The Court: But you say some explanation or interpretation is to be put upon those words "retained

(Testimony of Karl P. Blaise.)

net" other than as appearing from the words themselves?

Mr. Cook: That appears to me very clear, but the contention in this case is, and the testimony so far is that one man says certain things have to be considered in determining retained net, and our theory is it has no place in there at all. [63a]

Mr. Cook: I can only say this, I am not infallible, but I am content to rely on the pleading, but however I have no hesitancy in making an application, and I do now ask leave to amend to include that in the application. [63b]

The Court: It would be informative to the court if you made a specific proposal of amendment. What is your amendment and what do you propose to amend? So there will be something definite before the court.

Mr. Cook: Since there is no provision for a reply I suppose it would have to be an amendment to the amended complaint by alleging as Paragraph 10 of said Complaint that under the usages and customs of the insurance business and in the insurance world the term "net retention" or the term "amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company", does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention.

(Testimony of Karl P. Blaise.)

Mr. Dumett: Without any desire to be technical with my good friend Mr. Cook, I do feel I should object to that application.

I think that is in the nature of a pleading that should have been made in the first place if he was intending to rely on any such proof; and we are contending it should have been in the Complaint and not in a Reply; and if it has any place in the case at all it is a part of their cause of action; and I do feel the proposed amendment comes too late.

The Court: Mr. Dumett, do you claim that the wording of the requested amendment is not sufficient to make material this question to which you have now an objection?

Mr. Dumett: Yes, Your Honor, I do. I claim the amendment besides being untimely does not make material this line of inquiry.

I have two objections. First, the inquiry is not within the issue stated in the Complaint, but my second point is that even though the complaint had the express allegation in [64] it to that effect, the testimony is inadmissible in view of the fact the Court has before it by admissions of the parties the written contract, which on the face of it does not permit of any such construction or amendment.

The Court: Well, gentlemen, I haven't the slightest hesitancy in stating if I ever saw a contract that seemed technical and unfamiliar in its terms to me as a trial judge this is one, and it is more so than any I ever saw.

In such consideration as I have so far given to the

(Testimony of Karl P. Blaise.)

terms and provisions of this contract they seem about as unfamiliar to me as any I ever read, and I am inclined to think laymen, those other than insurance people, people engaged in the insurance business, would find it, as they do generally as to insurance contracts, more or less mysterious.

I am not taking this question in its view most favorable to the objecting party. I am not prepared to certainly say that this phrase which the plaintiff seeks to allege has a special trade meaning or has a special interpretation put upon it by the usage of the trade, or is not a technical phrase peculiar to that insurance business, and not being prepared to say certainly that it has no such technical trade meaning, it seems to me it would be error for the court to hold that the party is without right to put that question in issue and in a proper manner offer proof relating to it, and in order to make certain that he has that right, which he asserts, it seems to me from his standpoint it is much safer to have the amendment expressly putting it in issue, and he has requested that amendment at this time and that request, in my opinion, should be granted, unless there is material prejudice resulting to the opposite party by reason of the time the request was made. [65]

I do not think it is late to be made—to be attempted to be made—at this time and not before. Some suggestion was made by someone—I got the impression that someone made the suggestion that if the court ruled against the plaintiff on this ques-

(Testimony of Karl P. Blaise.)

tion and the question allied with it that finally the plaintiff would ask a trial amendment of the pleadings. That was at the commencement of the trial.

But notwithstanding that this court is engaged in trying to find out what the truth is on these issues, and these parties litigant are interested first and last and all the time in ascertaining the truth applicable to these issues raised here, and which ought reasonably to be raised here, in order to fully and finally dispose of this litigation.

And so considering those circumstances and all of them, the court feels that this trial amendment to the pleadings requested should be granted, but that a reasonable time, even after the completion of the taking of the testimony that is now arranged to be taken and contemplated, and this trial should be held open for a reasonable length of time to give the defendant an opportunity to bring forth any evidence on that issue he thinks should be brought forth. I think the court should reserve that right to the defendant.

The Court: This trial amendment requested by the plaintiff is now granted, provided, however, that upon the completion of the taking of the testimony that is now available at this trial, which counsel had until now contemplated would be all the testimony that would be taken, the Court will continue this case for further trial and the taking of further testimony, for the purpose of allowing the defendant an opportunity of presenting such testimony on this issue [66] tendered by this amendment, as

(Testimony of Karl P. Blaise.)

the defendant may reasonably wish to offer, and that continuance shall be to the 1st day of March, 1943, and on that date I wish counsel—if it is not done before—to appear in court and be ready to proceed to trial on the further trial of this case.

The objection to the question will be overruled in view of the allowance of this amendment and in view of this amendment, and the witness may now answer the question, which I think has not been answered.

Before you read the question I would like to accept the offer of counsel to provide me at the parties' joint expense a transcript of this testimony, and you may do that at any time if that is convenient. You need not wait until March 1st, but you may do so at any time that is convenient. [66a]

Mr. Dumett: It is my understanding now that it is not necessary to take exceptions, Your Honor.

The Court: If this case is covered by the new rules you do not need to take exceptions. What do you think about it, Mr. Cook?

Mr. Cook: It is not necessary in my mind.

The Court: Very well, that will be the understanding. You may read the last question.

(The reporter then read the last question.)

The Court will overrule that objection. The Court does now, if it has not already, overrule the objection in view of the amendment, and an exception is allowed.

You may now answer the question, Mr. Witness.

(Testimony of Karl P. Blaise.)

A. The net retention is that amount of liability on a given risk remaining to the account of the primary company after the deduction of all specific reinsurance from the gross line relating to that particular risk.

The Court: You might explain that language. I suppose you mean the principal insurer, do you not? It may be my supposition is entirely wrong, and that illustrates you should explain a term like that.

A. The gross line, assuming a company had written a gross line [67] for \$100,000, the policy was for \$100,000, but it was their desire to retain only \$25,000 on that risk, they would reduce the gross line of \$100,000 by specific reinsurance, specific cessions to other companies, until the gross line had been reduced to \$25,000.

Q. And tying that in with the policy in force here, the gross line was \$350,000 on the bridge?

A. Yes, sir.

Q. And that was reduced by specific reinsurance to \$50,000? A. Yes, sir.

Q. And then would the \$50,000 be the net retention of the Northwestern Mutual Fire Association under that policy?

Mr. Dumett: May it be understood, to avoid repletious objections, that the objections previously stated to this line of questions may be understood as running to all this testimony?

Mr. Cook: That is agreeable to me.

(Testimony of Karl P. Blaise.)

The Court: That is approved by the court with this condition, that if at any time it occurs to you there is any added reason or basis for your objection to whatever happens you will thereupon advise the court of that.

Mr. Dumett: I will, Your Honor.

(Last question read.)

A. Yes, sir.

Q. What have you to say as to using a catastrophe policy in any way in computing the net retention of a reinsured company?

A. A future catastrophe policy does not specifically make any cession on any specific risk. It is merely for the protection of the net retained lines of the primary company, nationwide, wherever they may be located.

Q. Will you explain as briefly and as clearly as you can, in [68] non-technical language, if you can, the difference between specific reinsurance and catastrophe excess insurance?

A. Specific reinsurance is used solely for the reduction of the liability on an individual risk.

Catastrophe reinsurance is for the purpose of protecting all of the net retained lines—that is, after the individual risks have been reduced down to the desired amount by the primary company, it still is confronted with the possibility of a catastrophe loss, either by conflagration, wind storm, flood, earthquake, or any of the catastrophic hazards, for which the primary company will obtain, for its own pro-

(Testimony of Karl P. Blaise.)

tection, a catastrophe cover, which covers nationwide throughout the territory that it operates on all of the lines it retains net, so that no accumulation of small losses resulting from wind storm or conflagration can cause it any substantial loss. Practically all companies carry that protection.

Q. Is catastrophe excess insurance written on specific losses or not?

A. No. They are general covers, applying to all net retained lines, but not applying to any specific risk.

Q. Are you familiar with the policy, plaintiff's Exhibit "1", which was in force on the Northwestern at the time this loss occurred?

A. Yes, sir. I have looked at it.

Q. Assuming that one cause, or one catastrophe, one wind storm, for instance, caused damage all the way from Tacoma to Seattle, we will say, would this policy, Plaintiff's Exhibit "1", come into play then on all risks of the Northwestern in that territory?

A. Yes, sir.

Q. Regardless of the size of the policy or anything else? [69]

A. That is correct.

Q. Supposing the day afterwards another wind-storm came into effect, or happened, which did only \$10,000 worth of damage to one risk of the Northwestern, would this policy come into effect?

A. No, sir.

Q. Will you explain why, on that?

A. Because in the first storm there are involved

(Testimony of Karl P. Blaise.)

risks numerically—a sufficient number of them—to exceed the Northwestern's retention, and consequently the purpose of the policy comes in full force and effect then, for any loss in excess of the \$30,000 of retention prescribed.

In the other case the loss on the individual risk was only \$10,000, and therefore not in excess of the \$30,000 retention, and there would be no recovery under the catastrophe policy.

Q. I was trying to make clear this point that one event or one storm, one catastrophe is the thing insured against in that policy, is that not correct?

A. That is correct, sir.

Q. Regardless of where the damage may be done by that single event? A. That is right.

Q. Why is not insurance of this type considered in determining the net retention of a reinsuring company? A. You mean on a specific risk?

Q. Yes.

A. For the reason that this catastrophe policy is general protection, applying to all risks nationwide or within the territory within which the company operates.

In view of the fact it does not designate any specific risk of any kind at all, as a cession of the primary company, [70] it cannot operate to reduce the liability on any given risk.

Q. Could you give us any illustration to show why you could not use this policy in figuring a net retention?

(Testimony of Karl P. Blaise.)

A. Well, as I stated previously, the net retention is arrived at by specific cessions from the gross line. This policy here makes no specific reinsurance.

Q. That no doubt is clear to insurance men, but I wonder if you could not give us a homely illustration, taking the policy in force in this case, or in issue in this case, affecting the Tacoma-Narrows bridge, and illustrate in some way why it would be impossible to take that into consideration, in arriving at the net retention?

A. Well, in the case of the Tacoma Narrows bridge the gross line of the Northwestern was \$350,000.

In each and every reinsurance placed upon that bridge by the Northwestern that particular risk was ceded by the Northwestern to some other company until the retention of the Northwestern had reached \$50,000.

This policy could not be taken into consideration on the individual risk of the Tacoma Narrows bridge for the reason that no specific cession is made under this policy. Therefore, it could not reduce the retention of the Northwestern.

Q. Well, referring more specifically to the testimony heard this morning, whereby it appeared it could be figured to reduce the net retention to \$32,000, by taking the face of that policy, plus 10% of the additional \$20,000, what have *you say* as to that?

A. As to the individual risk on the Tacoma Nar-

(Testimony of Karl P. Blaise.)

rows bridge there has been no reduction in the net retention of the Northwestern through this general catastrophe policy.

I might add to that that the Northwestern in filing its [71] annual statement will show the full risk and the full premium on \$50,000 in force in its annual statement. There will be no diminution of the amount of the risk of premium because of the issuance of this policy.

Mr. Dumett: I object to the latter part of that statement as not being responsive, and being something beyond the line of questioning that is now being gone into. What may happen in the future does not have any bearing on the witness' opinion that he is expressing as to what this contract means.

The Court: Any response?

Mr. Cook: I didn't hear the statement.

Mr. Dumett: I said that the witness answered that the Northwestern would show this and so and so, and that is not responsive.

The Court: That part of the answer will be stricken, and the court will disregard it. [71a]

Q. Mr. Blaise, is there any way of telling prior to a loss whether this policy will be affected on any particular risk? A. No, sir.

Q. Is that to be considered at all then in determining what the net retention is? A. No, sir.

Q. Why can you not prior to a loss determine what effect this policy will have upon the liability of the Northwestern?

A. Well, the loss may or may not happen, and

(Testimony of Karl P. Blaise.)

it cannot be determined until after the loss has determined as to what effect this policy may have on the particular risk.

Q. Assuming that in addition to the bridge policy the Northwestern had insured two or three houses around close to the bridge which had been blown down, would that fact have further affected the amount payable under that policy?

A. Yes, sir.

Q. And by the same token a loss any place else from the same wind? A. Yes, sir.

Q. Do reinsuring companies report the existence of catastrophe contracts to their reinsuring?

A. Do reinsuring companies——

Q. Do reinsured companies, I should have said, report the existence of catastrophe contracts held by them, to their reinsuring companies, when they cede them a certain specific risk?

A. Not always. It depends on whether or not the reinsuring company makes specific inquiry or the ceding company makes specific inquiry, or whether or not the information is available elsewhere. [72]

Q. How universal is it in the insurance world for companies to carry catastrophe reinsurance?

A. Practically every fire and windstorm insurance company carries catastrophe reinsurance.

Q. Is that a matter of common knowledge in the trade? A. Yes, sir.

Q. Is such information available to anyone who may wish to inquire about it? A. Yes, sir.

(Testimony of Karl P. Blaise.)

Q. Where is that information available?

A. It is available in the year books, some of which are issued by the Spectator Company and some by the Alfred M. Best Company, and in Schedule "T" in the Convention Form of blank.

Q. Handing you Plaintiff's Exhibit "3" for identification, do you know what those forms are, what they are used for?

A. They are reinsurance daily reports.

Q. That is from the reinsured company to the reinsuring company? A. Yes.

Q. Is that the nature of the reports that come in to your company?

A. Yes. We have received some business on these daily reports and other business comes in on what is known as a reinsurance bodereaux.

The Court: Will you explain that term?

A. The difference between a reinsurance bodereaux and a reinsurance daily report—a daily report is issued for each separate risk ceded. The bodereaux is a long sheet of paper with a columnar distribution and a great many risks are listed on the bodereaux, with the information on each risk set out in complete detail.

In other words, it is a sheet which may take the place of twenty daily reports,—twenty will be on one sheet, instead [73] of having an individual sheet for each one. It is a short cut for the daily report system.

Q. In your experience either on bodereaux or these daily reports, have you ever seen any reference

(Testimony of Karl P. Blaise.)

made by the reinsured company to the existence of catastrophe excess insurance? A. No, sir.

Q. And why does it not appear on those reports?

A. Because it has nothing to do with the reduction of the liability on any given individual risk.

Q. How many of those reports do you suppose you have seen in your experience?

A. Well, a great many. It would probably run into tens of thousands.

Q. Is it the practice in the insurance business to advise your reinsuring company specifically on the daily report of the existence of a catastrophe excess policy? A. No, sir.

Mr. Dumett: The same objection. I make it again because this is a slightly different form of question, but under the same category of examination as to practice.

The Court: The same ruling; the objection is overruled.

Mr. Cook: I think you may cross examine.

Cross Examination

By Mr. Dumett:

Q. Mr. Blaise, what is the major purpose of having any provision at all as to net retention in reinsurance contracts?

A. The stated net retention is for the purpose of advising the reinsuring company the amount of liability retained by the primary company.

Q. Most reinsurance treaties require, do they not, some retention, some net retention, by the reinsuring company? [74]

(Testimony of Karl P. Blaise.)

A. As a general rule that is correct, yes sir.

Q. What is the importance of the statement of that net retention to the reinsuring company? Why is the reinsurer interested at all in a stated net retention by the reinsured company?

A. It gives the assuming company some idea of the underwriting of the direct writing company as to what they desire to retain net for their own account and gives rather an appraisal of the desirability of the risk.

Q. And do not most of those reinsurance treaties also provide that that stated net retention shall be continued during the life of the insurance?

A. Well, it did at one time, but in general practice that has been somewhat dropped in recent years.

Q. You mean to say in recent years even in a treaty which requires a specific net retention that the reinsurer permits the reinsured after the cession to drop the net retention entirely?

A. Not entirely but reduction is permissible.

Q. Is it not also the purpose of the net retention requirement to assure the reinsurer that the reinsured, by maintaining a substantial interest in the insurance, will use due care and diligence in placing the insurance?

A. That is correct, yes sir.

Q. And it is also some assurance that the reinsured company will use due care and diligence in investigating and adjusting losses?

A. That is correct, yes sir.

Q. Now in the case of the Tacoma Narrows

(Testimony of Karl P. Blaise.)

bridge, assuming what we know to be true, assuming that the Northwestern ceded \$50,000 of reinsurance to the Union, and stated it would retain \$50,000 net of that same insurance, and assuming further that at the time of the cession the Northwestern had this exhibit "1", [75] this excess catastrophe policy, and assuming that policy said in effect that in the event of any loss sustained by the Northwestern in excess of \$30,000, arising from one catastrophe, it would be protected on the excess to the extent of 90%—assuming that substantially—assuming those facts, isn't this true, viewing the situation as of the date the Northwestern made the cession, that the highest possible loss which the Northwestern could sustain, by reason of its insurance on that bridge, at its own risk and liability, and as a result of one catastrophe, was \$32,000?

A. I think that would be substantially correct.

Q. On that assumption I am asking you to make there is no conceivable set of circumstances that could have increased their liability on their own risk above \$32,000 for loss from one catastrophe on the bridge is there? A. No, I think not.

Q. Referring to Plaintiff's Exhibit "1", which is this excess catastrophe policy, Paragraph 6—I will hand it to you in a moment—Paragraph 6 on the second sheet inside of the folder, states: "The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate net loss of the reinsured company on its net

(Testimony of Karl P. Blaise.)

retained lines only”—calling your attention particularly to the words “ultimate net loss of the reinsured company on its net retained lines only.” You may check it but you probably remember it (handing exhibit “1” to witness). What is your interpretation of that clause as to what it means, relating to net retention?

A. The ultimate net loss of the reinsured company on its net retained lines only would mean the loss sustained on the lines retained, after the deduction of specific reinsurance applying to all risks involved in the catastrophe, and the ultimate net [76] loss would be the gross loss less the recovery on all specific reinsurance placed on the properties involved.

Q. In the case of the Tacoma Narrows bridge the Northwestern insurance on that, related to the figures, what would that be—assuming a total loss?

A. I am not familiar with the maximum limit of this. That would simply be—will you ask the question again, please?

Q. The net loss referred to there in the language which I have read—

A. Yes.

Q. Is that the same thing or in any way different from the definition of net retention which you have heretofore given us?

A. There is a difference between net loss and net retention, yes.

Q. And how does that differ from the definition you have given of net retention?

A. In this case the loss applied to a specific risk,

(Testimony of Karl P. Blaise.)

or two risks, depending on the underwriting department of the Northwestern, whether they considered it one risk or two risks.

Q. And assuming one risk?

A. Assuming one risk there would have been no loss.

Q. Assuming two risks?

A. Assuming two risks there would have been a loss.

Q. And assuming a total loss regardless of the risks.

A. The Northwestern would have paid the first \$30,000 and 10% of the balance up to \$50,000.

Q. Or \$32,000? A. Correct.

Mr. Dumett: I believe that is all.

Redirect Examination

By Mr. Cook: [77]

Q. You say there is a distinction between net loss and net retention?

A. Yes; they are entirely different.

Q. What is the difference between the terms "net loss" and "net retention"?

A. Well, the net retention of the company if the amount it retains under any given policy for its own account. The net loss may only be partial and be less than the net retention.

Q. Does this contract, exhibit "1", have any bearing upon what the ultimate net loss of the company may be?

A. As a catastrophe contract, yes, it would have a bearing on the ultimate loss.

(Testimony of Karl P. Blaise.)

Q. It can affect the ultimate net loss?

A. Yes, sir.

Q. Does it have any effect on what is the net retention? A. No, sir.

Q. Counsel's hypothetical questions to you—you recall a couple of them—were based upon the happening of one catastrophe? A. Yes, sir.

Q. On that bridge, and I understood you to say their maximum loss from one catastrophe would be \$32,000, under that policy?

A. Under this policy, yes sir.

Q. Might it not be even less than \$32,000?

A. You mean the loss?

Q. The net loss to the Northwestern, because of the existence of that policy?

A. Well, if there was a partial loss it would be less.

Q. No, assuming that the Northwestern had other buildings insured which were also destroyed by the same catastrophe, would that not also affect the ultimate net loss on that bridge? [78]

A. Well, it might through an apportionment of the loss spread to all individual risks involved.

Q. Let us assume that the Northwestern had a building sitting right next to the bridge insured for an additional \$50,000, and both the bridge and the house were destroyed, what would be the total payment by the Northwestern for both the bridge and the house?

Mr. Dumett: I think that is improper redirect

(Testimony of Karl P. Blaise.)

examination, and I object to it on that ground. He went into it fully on the direct examination.

The Court: Is there any response to that suggestion?

Mr. Cook: This is certainly redirect examination on this specific question counsel brought out. I don't recall going into it in direct examination. I do think it is a little argumentative, as a lot of this testimony has been, but I think in the nature of the case it has to be argumentative.

The Court: He may answer this question, but try to be as brief as to any other similar questions. Read the question.

(Last question read.)

A. The total gross payment for the Northwestern would be \$100,000, subject to catastrophe cover.

Q. How much would it cost the Northwestern?

A. It would cost them \$30,000 plus 10% of seventy thousand dollars.

Q. Or \$37,000? A. Yes, sir.

Q. Only for the full \$100,000 of insurance?

A. That is correct.

Q. What could be the maximum cost to the Northwestern for damage to the bridge under the policy in question from two catastrophies rather than one?

A. I don't know whether this has a reinstatement provision or not. [79]. I assume that it does. The Northwestern in that instance on the bridge on two

(Testimony of Karl P. Blaise.)

catastrophies could recover the two same identical amounts, \$32,000 in each case.

Q. Assuming that the damage to the bridge was only \$29,000 there would be no recovery under that policy, would there? A. No, sir.

Q. And assuming that six months later a second accident had caused damage to the bridge to the amount of \$21,000, would there be any recovery under that policy? A. No, sir.

JOHN F. SULLIVAN,

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Cook:

Q. Will you state your name, please?

A. John F. Sullivan.

Q. Where do you reside? A. Seattle.

Q. What is your business?

A. I am associate manager of the Frank Burns Company, reinsurance brokers.

Q. How long have you been associated with that concern? A. Since October 1, 1942.

Q. Prior to that time with what department of the State of Washington were you connected?

A. With the Insurance Commissioner's Office.

Q. For how long? A. Since April 1, 1933.

Q. In what capacity? [80]

(Testimony of John F. Sullivan.)

A. As Deputy Insurance Commissioner.

Q. Are you familiar with the various forms of reinsurance contracts for specific insurance and also catastrophe insurance? A. Yes, I am.

Q. In your experience with the State Insurance Department what contact did you have with the cession of insurance business?

A. In connection with reviewing annual statements, examinations of companies, and general executive duties in the Department I had considerable contact with the reinsurance contracts of the domestic companies particularly.

Q. And your business now is devoted entirely to reinsurance brokerage business? A. It is.

Q. Are you familiar, Mr. Sullivan, with the meaning in the insurance trade of the term "net retention" as we have used it here in this trial?

A. Yes, I am.

Q. Will you explain to the Court what that is?

Mr. Dumett: Just a moment. This being a new witness I take it I should probably renew the objection that I have previously made to this line of testimony on all the grounds urged.

The Court: The objection is overruled.

A. Net retention as it is used in the trade means the amount which a company would retain of the risk for its own account of a policy of insurance which would have been issued for possibly a larger amount, and they may have ceded off or given off some of the risk to other companies through means of reinsurance.

(Testimony of John F. Sullivan.)

Q. Does specific reinsurance affect the amount of the net retention of the insuring company? [81]

A. Yes, sir; it does.

Q. And how and in what way?

A. If a company cedes off by means of specific reinsurance it reduces the amount it has at risk.

Q. Does catastrophe excess reinsurance affect in any way the net retention of an insuring company?

A. No, it does not.

Q. Why not?

A. Catastrophe reinsurance covers the whole spread of the company's business. As a matter of fact it is generally thought of as more or less surplus reinsurance.

Catastrophe reinsurance is purchased by all prudent companies with a view of eliminating the possibility of a serious shrinkage in surplus by reason of a large loss, and as far as affecting the particular risk, it applies to no particular risk, but applies to the whole spread.

The Court: Would it be more economical for the company instead of farming out part of its risk to take a proportion of the risk instead of originally becoming obligated to the extent of \$100,000 of insurance, why not just take a fourth of it? Would that not be more economical than to take it all and then farm out part of it?

A. It would not, for this reason. From the standpoint of the public, a company being able to issue a policy for \$100,000 of liability, which might be beyond its own ability to carry, by ceding off the

(Testimony of John F. Sullivan.)

excess liability it reduces the cost to the insured because only one policy is issued, and also the expense and commission that it bears for the proportion it cedes off is repaid by the company that reinsures.

Q. Is the existence or non-existence of a catastrophe reinsurance policy ever considered, to your knowledge, in determining net [82] retention of a company on a risk?

A. No, sir; it is not, to my knowledge.

Q. Have you ever known it to be considered in determining the net retention of a company?

A. I have never known it to be considered.

Q. Can you tell us of any additional reason why a consideration of the catastrophe insurance is not applicable in determining net retention?

A. The consideration of catastrophe insurance is not applicable because the question of whether or not catastrophe insurance will come into play is not known until the loss is determined. I can go on with an example.

Q. If you will, please.

A. Taking the case in hand here of the Tacoma Narrows bridge, there was some \$5,200,000 of insurance on the bridge, as far as the gross line to the State was concerned, and the Northwestern Mutual Fire Association wrote \$350,000 of it.

It had a retained line of \$50,000, considering the risk as being 50% subject, or probable maximum loss of 50%, and consequently the underwriter that handled it anticipated no loss in excess of \$25,000

(Testimony of John F. Sullivan.)

from any one individual loss on that bridge, and so if the loss had been of a different amount than it was—say instead of a \$4,000,000 loss it had been a \$400,000 loss—the net retention line of the company was \$50,000 whether there is a \$4,000,000 loss or a \$400,000 loss.

The fact that after the loss this catastrophe excess came into play has absolutely no connection and no underwriter could tell it would come into play on a given loss.

Q. Does the amount of the loss ultimately sustained have anything to do with the net retention as such? A. No, it does not. [83]

Q. Are they two separate and distinct matters?

A. They are entirely separate items.

Q. Can you make any further distinction between the term of “net loss” and “net retention” than you have already made?

A. Net loss to a company is the amount of money it pays out, taking into account salvage, and its specific reinsurance or even its catastrophe reinsurance, for that matter, but that is only taken into account at the time of the loss.

I don’t think it would be possible for anyone to take into account a catastrophe cover at all, in setting your net retained line.

Q. In your experience in the insurance business have you ever known of any instance where catastrophe reinsurance has been considered in determining net retention?

(Testimony of John F. Sullivan.)

A. No, I do not.

Q. Are you familiar with the examinations made by the various departments of the domestic insurance companies in this State? A. Yes, I am.

Q. How often are those examinations made?

A. In the State of Washington the examinations are made of domestic companies annually.

Q. Once a year?

A. And every three years there is an examination made under the auspices of the National Insurance Commissioners' Insurance Examiners from outside states who are invited to participate with the Washington Examiners.

Q. What do those examinations show with respect to catastrophe policies carried by the domestic companies?

A. The examination reports reveal the existence of such covers and would explain it rather fully.

Q. Does that give the exact terms of them? [84]

A. No, sir, They summarize the terms of them.

Q. Do they give the limits? A. Yes, sir.

Q. Those examinations are required to be made by law? A. Yes, sir.

Q. Where are those reports filed?

A. As far as the State of Washington is concerned our domestic companies— and I believe it is the practice of all states—immediately upon release of an examination report the copy is sent to the company and to Best for publication in their monthly magazine, and a copy is sent to each state in which the company is licensed to do business.

(Testimony of John F. Sullivan.)

Q. Assuming the Northwestern Mutual Fire Association would be licensed to do business in the State of Rhode Island would the examination reports of the Northwestern made by the Insurance Department of this State be on file in Rhode Island? A. Yes, it would.

Mr. Dumett: I object to that as being argumentative.

The Court: The objection is overruled.

Q. Do those reports of the examinations purport to show the amount of risk which each company has on its books? A. Yes, sir; they do.

Q. Is that the same as the term "net retention?"

A. Well, it would show both their gross and their net.

Q. Both their gross and their net retention?

A. That is right.

Q. In those reports——

A. Over all, that is.

Q. Yes. In those reports then, made by the Insurance Department of this State, does the net retention as shown in the report take into consideration the existence of catastrophe reinsurance? [85]

A. No, it does not.

Mr. Cook: You may inquire.

Cross Examination

By Mr. Dumett:

Q. In the field of reinsurance, Mr. Sullivan, we

(Testimony of John F. Sullivan.)

have one type of reinsurance commonly referred to as pro rata reinsurance, do we not?

A. Yes, sir.

Q. And is that the type of reinsurance that is involved in this case where the ceding company retains \$50,000 and cedes \$50,000 to the reinsuring company? A. Yes, sir.

Q. On that kind of pro rata insurance if there was a loss on the subject matter of the insurance—in this case the Tacoma Narrows bridge—of 77% of the total insurance then the reinsuring company would pay 77% of \$50,000 and the ceding company the same proportion? A. Yes, sir.

Q. I suppose that is where they get the term “pro rata”? A. That is right.

Q. There is also, is there not, a well known type of reinsurance in which the reinsurer pays only in the event that the reinsured's loss exceeds a certain sum? A. Yes, sir.

Q. Is that sometimes called surplus insurance?

A. No, sir; excess insurance.

Q. Sometimes referred to as excess of loss insurance? A. That is right.

Q. And you may have an excess of loss reinsurance which is not limited to one catastrophe, may you not? [86] A. Yes, sir.

Q. And that is straight excess of loss reinsurance? A. Yes, sir.

Q. And there is another type of reinsurance, is there not, where if the reinsured suffers a loss of more than a certain sum, arising from one catas-

(Testimony of John F. Sullivan.)

trophe, the reinsurer pays? A. Yes, sir.

Q. And that is commonly called catastrophe excess of loss reinsurance? A. That is right.

Q. It is common, is it not, in reinsurance treaties to have a provision requiring the reinsured, in the event of a cession, to retain a specified amount or a specified proportion of the insurance?

A. That is right.

Q. One of the purposes of such a net retention clause is to insure the reinsurer that the reinsured, by retaining a substantial share of the insurance, will exercise diligence in the placing of the risk?

A. Yes, sir.

Q. And also that it will use due diligence in investigating and adjusting possible losses?

A. That is right.

Q. Now in the present case, going back to the time the cession in this case was made by the Northwestern to the Union, which was in June, 1940, and assuming that in June, 1940, \$50,000 of reinsurance, covering this Tacoma Narrows bridge, was ceded to the Union by the Northwestern, and the Northwestern saying that it was retaining \$50,000 on the same property, and assuming on that same date the Northwestern had in effect a catastrophe reinsurance policy which provided in the event of a [87] loss suffered by the Northwestern as a result of one catastrophe, in excess of \$30,000, the reinsurer on the policy would pay 90% of the balance up to \$50,000, assuming that, it was certain, as of that date, was it not,—on the date of the

(Testimony of John F. Sullivan.)

cession—that the very top amount of that insurance that the Northwestern would have been liable for, in the event of a total loss on the bridge, resulting from one catastrophe, would be \$32,000?

A. That is right.

Q. Referring to the annual statements you referred to, Mr. Sullivan, filed with the State by the insurance companies, do these annual statements filed with the insurance department actually show the amounts of insurances and reinsurances and risks of a particular company?

A. The annual statement?

Q. Yes.

The Court: Like that you expected to be filed, in Rhode Island for instance.

A. That is the examination report. The examination report does show it, but he is talking about the annual statement.

Q. Does the annual statement show what I have reference to? Do the annual statements you refer to, which I understand are filed with your Department,—who makes them out, the individual companies?

A. Yes, sir.

Q. Do the annual statements filed with the insurance department actually show the amount of insurances and reinsurances of a particular company at risk?

A. I believe they do—yes, they do. The examination report does. [88]

Q. Is that the one made out by the Department?

A. Yes, sir.

(Testimony of John F. Sullivan.)

Q. As a result of its examination of each company? A. That is right.

Q. Do those examination reports show that?

A. Yes, sir; they do.

The Court: Do you mean to say both the financial statement and also the examination report show the items of information mentioned by Mr. Dumett?

A. I believe they both do. I am sure the examination report does, and I am pretty sure the schedule does.

Q. (By Mr. Dumett) But you are not sure about that? A. That is right.

Mr. Dumett: That is all.

Redirect Examination

By Mr. Cook:

Q. Referring to the hypothetical question put to you by Mr. Dumett, where he assumed the total loss that the company could have had was \$32,000 from any one catastrophe on the bridge, assuming that that same windstorm had done enough damage in the community there to other property insured by the Northwestern to exhaust the limits of the plaintiff's Exhibit "1", what effect would that have had upon their liability on the bridge?

Mr. Dumett: The Northwestern?

Mr. Cook: That is right.

A. I am not sure I follow you, Mr. Cook. If the limits of this \$30,000 had been exhausted?

Q. This has limits beginning at \$30,000 and up to \$200,000. A. Yes, sir.

(Testimony of John F. Sullivan.)

Q. Assuming this storm had damaged other property insured by the [89] Northwestern to an amount in excess of the \$200,000 limit, what effect would that have had on the Northwestern's liability on the bridge?

A. The Northwestern would still be liable for the full amount of the policy on the bridge.

Q. For the full \$50,000?

A. That is right.

Mr. Cook: That is all.

(Witness excused.)

JOHN J. BEALL,

Called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Cook:

Q. You may state your full name, Mr. Beall?

A. John J. Beall.

Q. Where do you reside?

A. In the City of Seattle.

Q. What is your business?

A. I am executive vice-president of the Northwestern Mutual Fire Association.

Q. And you have been connected with that organization how long?

A. For twenty-three years.

Q. State briefly the nature of your duties.

(Testimony of John J. Beall.)

A. Almost from the start of my employment with that company on November 1, 1920, I became connected with the reinsurance department, and it has been my position in all of these years to solicit contracts of reinsurance, both assumed and ceding, and to supervise the acceptance and ceding of reinsurance.

I now have other duties in addition, underwriting [90] supervision and production.

Q. But you still have those duties?

A. I still retain that responsibility.

Q. Will you identify Plaintiff's Exhibit "1" as being the catastrophe excess contract in force at the time of the ceding of the insurance to the Union which is involved in this case (Handing to witness)?

A. This is the contract.

Q. And also in effect at the time of the loss?

A. That is correct.

(Thereupon said Plaintiff's Exhibit "1" was admitted in evidence. [91])

PLAINTIFF'S EXHIBIT 1

Lloyd's Policy

(Subscribed only by Underwriting Members of Lloyd's who have complied in all respects with the requirements of the Assurance Companies Act of 1909 as to security and otherwise.)

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

\$200,000 covering
90% of the excess
of \$30,000 loss,
each and every loss.

Printed at Lloyd's, London, England.

Whereas C. T. Bowring and Company (Insurance) Limited and/or as Agents of.....
(~~hereinafter called "the Assured"~~), have paid
U. S. \$18,000.

Canadian \$2,000. Premium or Consideration to Us,
who have hereunto subscribed our Names to ~~insure~~
~~against Loss as follows:~~ Reinsure the Northwestern
Mutual Fire Association of Seattle, Washington,
and applying to their business in the United States
of America and Dominion of Canada in accordance
with Cover No. 81252 and subject to all terms and
conditions thereof and/or contained in agreements
relating thereto.

In consideration of the terms under which this
Policy is issued, the Reinsured Company under-
takes not to claim any deduction in respect of the
premium hereon when making tax returns, other
than Income or Profits Tax returns, to any State
or Territory or the District of Columbia.

This Policy only covers in respect of losses oc-
curring during the period commencing with 12:01
a.m. the First of January, 1940 and ending with
12:01 a.m. the First of January, 1941, ~~both days~~
~~inclusive.~~

If the ReAssured shall make any claim knowing

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

Now Know Ye, that We the Underwriters do hereby bind Ourselves, each for his own part, and not one for Another, Our Heirs, Executors, and Administrators, to pay or make good to the ReAssured or to the ReAssured's Executors, Administrators, and Assigns, all such Loss or Damage as aforesaid as may happen to the subject matter of this ReInsurance, or any part thereof during the continuance of this Policy; not exceeding the Sum of Two Hundred Thousand Dollars, each and every loss, such payment to be made within Seven Days after such Loss is proved and that in proportion to the several Sums by each of Us subscribed against our respective Names not exceeding the several Sums aforesaid.

In Witness whereof We, Underwriting Members of Lloyd's, have subscribed our Names and Sums of Money by Us reinsured.

Dated in London, the Nineteenth Day of April, One Thousand Nine Hundred and Forty.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

No. 81252

Contract of Insurance

Effected by

C. T. Bowring & Co. (Insurance), Ltd.,

52 Leadenhall Street, London, E. C. 3.

Reinsurers Lloyd's

In consideration of the terms under which this Contract is issued, the Reinsured Company undertakes not to claim any deduction in respect of the premium hereon when making tax returns, other than Income or Profits Tax returns, to any State or Territory or the District of Columbia.

19th April, 1940

We certify and declare that we have effected the following Contract of Insurance summarized hereunder, of which a copy is attached hereto.

For Account of The Northwestern Mutual Fire Association, of Seattle, Washington.

Excess of Loss Contract always open from 12:01 a.m. the First day of January, 1940, subject to Sixty days' written notice of cancellation.

Applying to the business of The Northwestern Mutual Fire Association in the United States of America and/or Dominion of Canada and to apply only to losses which occur during the currency of this Contract.

Limited to \$200,000 each and every loss being 90% of the excess of \$30,000 loss each and every loss.

Premium of U. S. \$18,000 and Canadian \$2,000 to

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

be paid hereon on the First day of January each year.

C. T. BOWRING & CO. (INSUR-
ANCE) Ltd.

WM. M. PRYCE

Director.

Addendum

Attaching to and forming part of Contract No. 81252.

Issued to: The Northwestern Mutual Fire Association.

(Catastrophe Contract)

It is understood and agreed that the following Articles are added to the conditions of this Contract.

Service of Suit Clause.

17. It is agreed that in the event of dispute as to the validity of any claim made by the Reinsured Company under this Contract, Reinsurers hereon, at the request of the Reinsured Company, will submit to the jurisdiction of the United States District Court in the Federal District in which the principal office or address of the Reinsured Company is located and will comply with all legal requirements necessary to give such Court jurisdiction, and that in any suit instituted by the Reinsured Company against any one or more of them upon this Con-

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

tract, Reinsurers hereon will abide by the final decision of such Court or any Appellate Court, in the event of an appeal, provided, however, that if the Federal Courts do not have or refuse jurisdiction for any reason, Reinsurers will submit to the jurisdiction of the Courts of the State in which the principal office or address of the Reinsured Company is located.

Messrs. Duncan and Mount, 27, William Street, New York, and/or their nominees are hereby duly authorized and empowered to accept service on behalf of Reinsurers on submission to jurisdiction as aforesaid.

Arbitration Clause.

18. As a condition precedent to any right of action hereunder if any dispute shall arise between the Reinsured Company and the Reinsurers with reference to the interpretation of this Contract or the rights with respect to any transaction involved, the dispute shall be referred to two Arbitrators, one to be chosen by each party and such Arbitrators shall choose an Umpire before entering upon the reference and in the event such Arbitrators shall fail to agree, the decision of said Umpire shall be final and binding upon all parties. The Arbitrators and the Umpire shall interpret this Contract as an honourable engagement and they shall make their award with a view to effecting the general purpose of this Contract in a reasonable manner, rather than in accordance with a literal interpreta-

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

tion of the language. Said Arbitration to be held in New York, U.S.A. unless the disputants agree otherwise.

As agreed by Reinsurers,

C. T. BOWRING & CO., (Insurance) LIMITED,

WM. M. PRYCE

Director.

All other terms and conditions of the Contract remaining unchanged.

Dated, London, 18th July, 1940.

JL/FH

Attaching to and forming part of Contract No. 81252.

Northwestern Mutual Fire Association
of Seattle, Washington

1. In consideration of the premium and the other stipulations named hereinafter,

Various Underwriters at Lloyd's, London
(hereinafter referred to as the "Reinsurers").

do hereby reinsure the

Northwestern Mutual Fire Association,
of Seattle, Washintgon (hereinafter
referred to as the "Reinsured Company"),

as follows:—

2. This agreement is Excess Reinsurance by the Reinsurers, in favour of the Reinsured Company,

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

and applies blanket to all hazards written by the Reinsured Company, (liability assumed under Excess reinsurance contracts excluded) on property wherever located in the United States of America and/or Dominion of Canada.

3. "Earthquake" as covered under this Contract is understood to mean any earthquake and/or series of earthquakes occurring at the same general location during any one period of twenty-four consecutive hours.

"Windstorm and Hail" as used in this Contract shall be construed to include loss to the Reinsured Company from Windstorm, Cyclone, Tornado and resulting loss including Fire (if covered under Windstorm Policies) and Hail.

"One loss" from these hazards is hereby agreed to include all windstorm and hail losses (above defined) sustained by the Reinsured Company within a 48 hour period beginning with the moment of the occurrence of the first loss to be included in any claim under this Contract.

4. The Reinsurers are not liable for any loss or damage unless the Reinsured Company has paid or has become liable for a nett amount in excess of Thirty Thousand Dollars in any one loss, and then only for 90% of the amount of such loss or damage in excess of Thirty Thousand Dollars but in no event to exceed Two Hundred Thousand Dollars.

5. The Reinsured Company agrees to notify the Reinsurers in case it makes any fundamental

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

changes in its underwriting policy with respect to nett lines.

6. The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate nett loss of the Reinsured Company on its nett retained lines only; and no claim is collectible hereunder unless the Reinsured Company has paid or has become liable for a sum or sums in respect of any one loss in excess of the nett amount mentioned above; and 90% of any salvage or recovery made in respect of any such loss (except any amount of such recovery necessary to reduce the said ultimate nett loss to an amount equal to the amount of this Cover plus the retained line hereunder of the Reinsured Company) is for the benefit of the Reinsurers up to the amount of any such loss paid by the Reinsurers. However, nothing in this Contract shall be construed as meaning that losses are not recoverable hereunder until the ultimate nett loss of the Reinsured Company has been ascertained. The Reinsured Company shall return to the Reinsurers their proportion of any amount recovered by salvage or subrogation within ten days after such recovery. The phrase "ultimate nett loss" as used in this Contract means the sum or sums (after the deduction of all recoveries and salvages) paid by the Reinsured Company in the settlement of claims and suits and in satisfaction of judgments (including expenses of litigation and other loss expenses) under its policies or contracts,

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

but it does not include remuneration of home office employees of the Reinsured Company.

7. It is understood and agreed that the occurrence of a Fire and/or Earthquake and/or other loss at the same time and at the same general location shall be treated as one and the same loss under this Contract and not as a separate loss for each hazard.

8. Pro rata and/or other excess reinsurance on the business covered hereunder is permitted. Pro rata and/or other excess reinsurance shall be first exhausted before this Contract applies.

9. In case a loss occurs involving liability under this Contract, the Reinsured Company agrees to give the Reinsurers notice of same as soon as possible; and the Reinsurers shall have the right to participate in the adjustment of each loss hereunder if they so elect. Any loss under this Contract shall be paid by the Reinsurers promptly upon receipt of proofs.

10. The Reinsured Company, at its regular place of business shall produce for examination upon the request of a representative of the Reinsurers all books, papers and documents pertaining to the business covered by this Contract; and in the event of a claim being made under this Contract shall produce for examination and verification all books, papers and documents pertaining to losses paid and/or incurred and reinsurance collected or to be collected on the business covered hereunder.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

11. If loss occurs, the amount thereof is automatically reinstated, in consideration of a reinstatement premium for the balance of the then current calendar year; with the understanding, however, that the Reinsurers' liability under this Contract shall never be more than Two Hundred Thousand Dollars in respect of any one loss or series of losses arising out of one event. Said reinstatement premium shall be calculated and paid at the end of said calendar year, and the reinstatement premium shall be a pro rata portion of the total amount of the annual premium of \$20,000 on this Contract, being "pro rata" both as to the fraction of the calendar year unexpired at the time of the occurrence of the loss and as to the fraction of the amount of the cover which was reinstated, (e.g. if a loss exhausting one-half of the amount of this cover should occur when one-fourth of the calendar year was as yet unexpired, the reinstatement premium due by reason of that loss would be equal to one-eighth of the annual premium of \$20,000 on this Contract).

As regards the hazards of Malicious Mischief Vandalism

It is agreed that for the purposes of this Contract the term "loss" shall mean all losses occurring in an area of one square mile during a period of 24 consecutive hours.

It being understood, however, that Reinsurers' liability hereon is limited to \$200,000 in

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

respect of any one loss and in all in respect of all losses during any one Calendar Year.

12. This Contract is for an unlimited period beginning at 12:01 a.m. Standard Time, the 1st Day of January 1940, but may be terminated by either party at the end of any calendar year by giving sixty (60) days' notice of such cancellation in writing.

13. It is understood that wherever the sign "\$" or the word Dollars appears in this Policy it shall be constructed to mean United States Dollars excepting in those cases where the policies are issued by the Reinsured Company in Canadian Dollars in which cases it shall mean Canadian Dollars.

In the event of the Reinsured Company being involved in a loss requiring payment in United States and Canadian Currency, the Reinsured Company's reunion and the amount recoverable hereunder shall be apportioned to the two currencies in the same proportion as the amount of ultimate nett loss in each currency bears to the total amount of ultimate nett loss paid by the Reinsured Company.

14. Mutual Marine Conference Warranty

Warranted the Reinsured Company shall not by the Chief Executive in the United States of the Reinsured Company whether elected or appointed or by its United States Attorneys in Fact or their partner(s) authorise or accept any risk on classes of business under the jurisdiction of the Mutual Marine Conference on a basis contrary to the forms,

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

rates, rules or commissions of that Conference provided that errors or omissions on the part of the Reinsured Company shall not prejudice this Contract the Reinsured Company agreeing on its part to correct such errors or omissions upon the same coming or being brought to its attention.

15. North American War Exclusion Clause (Internal Risk)

As regards interests which, at time of loss or damage, are Within the territorial limits of U.S.A. and Canada no liability shall attach hereto in respect of any such loss or damage which is occasioned by War, Invasion, Hostilities, Acts of Foreign Enemies, Civil War, Rebellion, Insurrection, Military or Usurped Power or Martial Law or Confiscation by order of any Government or Public Authority but this shall not be construed as relieving the Underwriters of liability for loss or damage which would be recoverable under a U. S. Standard Fire Policy containing a Standard War Exclusion Clause or a U. S. Explosion Conference Standard Riots and Civil Commotion Policy (containing "Mandatory Endorsement") with Vandalism and Malicious Mischief Endorsement No. 228/U/1 or No. 228/U/2 attached thereto or Vandalism and Malicious Mischief Endorsements in use by the Reinsured Company prior to 1st September, 1939, which may continue to be used by the Reinsured Company.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

16. It is understood and agreed that the Reinsured Company has underlying Excess of Loss Contracts for \$100,000 excess of \$10,000 loss, in respect of their Automobile Business \$75,000 covering 90% of the excess of \$15,000 loss, each and every loss in respect of Grain and \$125,000 any one risk covering 90% of the excess of \$12,500 any one loss any one risk in respect of Tornado, etc., and recoveries thereunder are to inure to the sole benefit of the Reinsured Company and shall not be taken into account in computing the ultimate nett loss to them for the purposes of this Contract.

It is warranted by the Reinsured Company that the Automobile and Tornado Reinsurances above-mentioned will be maintained by them during the currency of this Contract.

BON/ER

19/4/40.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

TARGET RISKS EXCLUSION CLAUSE

It is expressly understood and agreed that effective as and from the undermentioned dates no liability shall attach hereto in respect of the following risks and/or other risks as may hereafter by mutual agreement be included by endorsement hereto and that no liability in respect of such risks shall be included in the retention warranted hereon or in the amount of loss in excess of which this policy attaches:—

George Washington Bridge.....	A/c Port of New York Authority.....	1st April, 1939.
Holland Tunnel	A/c Port of New York Authority.....	1st April, 1939.
Lincoln Tunnel (Midtown Tunnel).....	A/c Port of New York Authority.....	1st April, 1939.
San Francisco Oakland Bay Bridge.....	A/c California Toll Bridge Authority.....	14th December, 1938
Golden Gate Bridge	A/c Golden Gate Bridge & Highway District	1st October, 1940.
Mellon Collection of Fine Arts.....	A/c A. W. Mellon Educational and Charitable Trust Washington	Date of attachment under Target Risk Scheme.
Frick Collection of Fine Arts.....	A/c Trustees of the Frick Collection, Inc., 1, East 70th Street, New York, N. Y.	1st March, 1939.
Kress Collection of Fine Arts.....	A/c S. H. Kress and/or The Samuel H. Kress Foundation, 1020, Fifth Avenue, New York, N. Y.	1st March, 1939.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

Target Risks Exclusion Clause—(Continued)

Exhibits (Fine Arts) at and from various points and places in the United States and Canada to Repositories in New York, while there and to World's Fair, while there for exhibition and return to various points and places in the United States and Canada (or as original)	A/c Art Associates, Inc.....	1st April, 1939.
Paintings, Objects of Art and other items loaned for exhibition and covered in the premises of the Palace of Fine & Liberal Arts on Treasure Island at San Francisco Bay, including inland transits and whilst temporarily located at places other than the said Palace of Fine & Liberal Arts (or as original)	A/c San Francisco Bay Exposition and the Owners of Objects of Art loaned for Exhibition	1st February, 1939.
Bronx-Whitestone Bridge	A/c Triborough Bridge Authority, New York City	29th April, 1939.

(Testimony of John J. Beall.)

Q. Now, Mr. Beall, let me ask you generally the same questions I have the other witnesses in this case, to tell the Court the meaning in insurance language, and in the insurance business of the term "net retention", as we have used it here in this trial.

A. Net retention refers to the liability which the primary insurance company——

Mr. Dumett: Just a moment. I suppose I should, as a matter of form, renew the objection.

The Court: Yes. The objection is overruled.

A. Net retention refers to the amount of the primary insurance for which the primary company is liable, less the amount of specific reinsurance ceded. Could I give a simple illustration?

Q. If you will, please.

A. In the case of the Tacoma Narrows bridge the Northwestern assumed **liability to the Toll Bridge Authority** of \$350,000. [94] It had placed reinsurance totaling \$300,000. Its retention was \$50,000, the amount of our liability to the Toll Bridge Authority, less the amount of our reinsurance specifically placed.

Q. Does the existence of catastrophe reinsurance, such as evidenced by Exhibit "1", have any effect on the amount of retention?

A. No, sir.

Q. Why not?

A. Largely because of the impossibility of determining its effect. It is not related to any in-

(Testimony of John J. Beall.)

dividual risk. It has no application to an individual risk, but rather it applies only to a catastrophe.

Q. It may have some effect on the loss?

A. Yes, sir.

Q. Is there a distinction between loss and retention? A. Yes, sir; very definitely.

Q. What is it?

A. Retention is the portion of the line on which you pay so the loss will be pro-rated. The loss is the amount you finally have to pay. The net payment on this case at issue might be anywhere from \$1.00 to \$50,000, but your retention would be \$50,000 even on a \$1.00 loss, and there is no similarity whatever between retention and loss.

Q. You mentioned the use of it in pro-rating, I believe? A. That is right.

Q. Can you explain that in any more simple language to the Court? How is a retention used as a basis of pro-rating?

A. Pro rata reinsurance is sometimes referred to as contributing reinsurance, and the adjustment of the loss is proportionate to the pro-ration of the premium. Frequently reinsurance is [95] in fractions or in percentages.

We will retain half the line and pay half the premium to the reinsurer, and the reinsurer pays half the loss, whatever it may be. That is pro-rata or contributing reinsurance, and the basis of pro-rating the loss is the amount of the liability ceded or retained.

(Testimony of John J. Beall.)

Q. Referring specifically to this policy of \$350,000, how was the share of each company figured?

A. It was determined in accordance with the authorization of the reinsurance contracts, but in some cases because the line was a bit out of the ordinary, specific approval of the cession is secured in an abundance of precaution.

Q. How was the ultimate payment to the Toll Bridge Authority figured? A. Our share?

Q. Your share and the other reinsuring companies' shares?

A. As I understand it, we had a direct share to the extent of seven percent, and our payment to the Toll Bridge Authority was 7% of the total payment, and we had reinsured 33%, 30/35ths of our liability, and each company was 100-rated on its share of the loss in proportion to its share of the original liability and the premium.

Q. Incidentally, how many other companies besides the Union did you cede insurance to out of this policy for \$350,000?

A. Fourteen other companies.

Q. And all of the other fourteen companies paid the Northwestern their proportionate share of the loss? A. They did.

Mr. Dumett: I object to that as being immaterial.

The Court: That objection is sustained. [96]

Q. Will you state what the accepted usage and practice in the insurance world is about consid-

(Testimony of John J. Beall.)

ering catastrophe reinsurance in determining net retention of an insurance company?

A. Possible recovery under catastrophe contracts is entirely disregarded in respect to retentions.

Q. Handing you Plaintiff's Exhibit "3" for identification, will you tell the court what that is?

A. This is the certificate copy of a daily report of reinsurance placed by the Northwestern with the Union.

Q. Those are how many, seven or eight?

A. Eight or ten.

The Court: It concerns other contracts of insurance other than such as your concern had with the Tacoma Narrows Bridge?

A. One actually is the Tacoma Narrows bridge, and the others are comparative. They are other risks.

Q. (Mr. Cook): Is that the Washington Toll Bridge Authority?

A. Pardon me. It is the Toll Bridge.

Q. Are these documents a part of the records and files of your company?

A. That is correct.

Q. And duplicate whites rather than yellow are forwarded to the Union? A. That is right.

Mr. Cook: We offer Plaintiff's Exhibit "3" in evidence.

Mr. Dumett: Are the copies sent to the Union exact duplicate or is there some difference?

(Testimony of John J. Beall.)

A. The form is slightly different but the portion which is produced for that particular relationship is identical because they are prepared on a ditto master, but they are filled in with the names of the companies, and the like.

Mr. Dumett: Is the typewritten matter the same? [97]

A. Yes, sir. You will observe those are prepared with a ditto, and they come from the same master.

Mr. Dumett: No objection.

The Court: It may be admitted.

Thereupon these daily reports were admitted in evidence as Plaintiff's Exhibit "3", which consists of sheets 1 to 9, inclusive, each sheet being on a printed form bearing printed title as follows:

Certificate of Reinsurance placed by the
Northwestern Mutual Fire Association
Seattle, Washington
with
Union Mutual Fire Insurance Company
Providence, Rhode Island

The material parts of these sheets are as follows:

Sheet 1

Amount \$40,000 on its policy or policies.....
issued for the term of 1 year to Mead and Mount
Construction Company et al.

Northwestern retains (a) identical \$40,000 (b)
other in or on \$20,000 R.R.C. P.M.L. 50%. Pro-
tection 2.

(Testimony of John J. Beall.)

Synopsis or Copy of Form

On the three and four story approved roof fire resistive building occupied as a residence quarters A. C. Barracks—Lowry Field, situate East Sixth Ave. and Quebec St., suburban to Denver, Colorado. 90% coins.

Sheet 2

Amount M \$40,000 A \$24,444 on its policy or policies [98] issued for the term of 1 year to Bercut Richards Packing Co., a corporation.

Northwestern retains (a) identical \$50,000 (b) other in or on \$......P.M.L. 30% Protection 4.

Synopsis or Copy of Form

M \$810,000 or 30% of the total insurance on the following form: \$2,700,000 on stock contained on premises situate on premises on North Seventh St., Bet. North "F" St. and American River, and K/A Main Plant premises, Sacramento, California. \$10,000 at any other location.

Provisional Insurance.

Sheet 3

Amount \$100,000 on its policy or policies..... issued for the term of 5 years to Bd. of Ed. Granite School Dist., Salt Lake Co.

Northwestern retains (a) identical \$100,000 (b) other in or on \$......P.M.L. 11%. Protection 4.

Synopsis or Copy of Form

On all property contained on premises occupied

(Testimony of John J. Beall.)

for school purposes and situate in Salt Lake County, Utah. 90% coins.

Sheet 4

Amount \$50,000 on its policy or policies.....
issued for the term of 5 years to Washington Toll
Bridge Authority, et al.

Northwestern retains (a) identical \$100,000 (b)
other in or on \$......P.M.L. 25% Pro-
tection.....

Synopsis or Copy of Form

On the Lake Washington Bridge and Approaches
connecting Seattle and Mercer Island in the State
of Washington. [99]

Sheet 5

Amount \$30,000 on its policy or policies.....
issued for the term of 3 years to Union Lumber
Co. and/or The Mendocino Lumber Co.

Northwestern retains (a) identical \$50,000 (b)
other in or on \$...... P.M.L. 35% Pro-
tection 3A.

Synopsis or Copy of Form

On all property contained on premises occupied
for woodworking purposes and situate premises the
southerly boundary of which is the Noyo Harbor,
the northerly boundary is Pudding Creek, the east-
erly boundary is the County Road outside of the city
limits of Fort Bragg, and the westerly boundary
is the Pacific Ocean, and in Mendocino City, Cali-
fornia.

(Testimony of John J. Beall.)

Sheet 6

Amount \$35,000 on its policy or policies.....
issued for the term of 3 years to Northwest Door
Company.

Northwestern retains (a) identical \$35,000 (b)
others in or on \$.....P.M.L. 60% Pro-
tection 2-A.

Synopsis or Copy of Form

On all property contained on premises occupied
for woodworking purposes and situate on the East
side of the City Waterway, and South of the Elev-
enth St. Bridge on Blk 40, Tacoma Tide Lands,
Tacoma, Washington.

90% coins.

Sheet 7

Amount \$40,000 on its policy or policies.....
issued for the term of 5 years to California Toll
Bridge Authority, et al.

Northwestern retains (a) identical \$200,000 (b)
other [100] in or on \$50,000 U & O. P.M.L.....%.
Protection

Synopsis or Copy of Form

On Bridge spanning San Francisco Bay between
San Francisco and Oakland, California.

Sheet 8

Amount \$40,000 on its policy or policies.....
issued for the term of continuous to San Francisco
Bay Exposition.

Northwestern retains (a) identical \$45,000 (b)

(Testimony of John J. Beall.)

other in or on \$2500 Blkt. Form. P.M.L. 20%. Protection

Synopsis or Copy of Form
Fine Arts Floater

To cover property principally located in the Palace of Fine and Liberal Arts on Treasure Island, San Francisco Bay, California.

Hazards: All risks of loss or damage including transportation to or from any point in the United States, Canada or Mexico.

Sheet 9

Same as Defendant's Exhibit A-5.

Q. (Mr. Cook): Now, if you will refer to Plaintiff's Exhibit "3", is that not true that each one of those sheets cedes to the Union an amount of insurance in excess of \$25,000?

A. That is correct.

Q. By what right or understanding was such amount ceded by those documents, in view of the contract restriction of \$25,000?

A. Because in our form more than a single risk was involved.

Q. Will you explain that more in detail?

A. If I seem to be going too far stop me. Under our theory of underwriting we will estimate the possibility of a loss as much as \$25,000 on a single risk. That is to us the percentage of valuation which in our judgment is subject to a loss in a [101]

(Testimony of John J. Beall.)

single event. The percentage in the case of a fire within a single fire area. If we find in our judgment the entire property is not subject to a single loss possibility or probability then we will show that estimate through a PML percentage, a probable maximum loss.

For instance, we will say because of the existence of a fire wall this loss will be confined to this section of the building, representing 50% of the valuation, and our PML on that value would be 50%, and we would underwrite it as two risks, and we could not give one of our reinsurers twice as much of the whole value as we would accept on a single risk.

Q. What on the dailies indicate to the Union the number of risks which you have underwritten—is that indicated on your cession to them of the re-insurance on the Tacoma Narrows bridge?

A. Yes, sir.

Q. How many risks did you underwrite the bridge as? A. As two risks.

Q. Why?

A. Because in our judgment no one event would create a loss to the total number of units involved in the bridge.

Q. Your judgment was in error?

A. I wouldn't agree to that.

Q. You would not? A. No.

Q. But at the time the policy was issued and this insurance ceded to the Union it was your judgment, the judgment of the company in underwrit-

(Testimony of John J. Beall.)

ing, that the possible maximum loss from any one event would not exceed 50% of the value?

A. That is right.

Q. Is that correct? [102]

A. That is correct.

Q. Are you prepared to say you used your good judgment in making such an appraisal on that risk?

A. Yes, sir.

Q. And you acted in good faith in so doing?

A. That is true.

Q. How long have you done business with the Union on that basis?

A. Since 1928.

Q. Have you ever had any other manner of indicating to them the basis upon which you were ceding the insurance to them?

A. Never at any time.

Q. Is the Northwestern admitted to do business in Rhode Island?

A. It is. It has been continuously, I think since about 1920.

Q. What have you to say as to your knowledge first of all of catastrophe contracts carried by other companies?

A. Since I try to sell catastrophe contracts and since I am responsible for the integrity of the reinsurance which we purchase, it has been my position and job to become acquainted with the catastrophe reinsurance.

Q. What has been the fact as to whether or not the insurance companies universally carry catastrophe reinsurance?

(Testimony of John J. Beall.)

A. I know of no reputable company that doesn't carry it.

Q. Where is the information concerning the type of catastrophe coverage that a company has available to any one who may want to know about it?

A. The Best Reports and the Spectator System. And I have viewed the examination reports. I look at the Best insurance cases which comes to the office of virtually every insurance company, and they report the examinations of insurance companies.

Q. You were in court when Mr. Legris read to the court the paragraph out of Best's concerning the catastrophe contract of the [103] Northwestern?

A. I was.

Q. Are you familiar with that provision in the Best Reports? A. I am.

Q. How long has that provision describing that catastrophe contract been in Best Reports, to your knowledge?

A. As long as I have been interested in Best reports. I would say for seventeen or eighteen years fully.

Q. I understand that the Union ceded insurance to the Northwestern on the same basis that the Northwestern in this case had ceded this \$50,000 to them? A. That is right.

Q. And was that done by similar documents to Exhibit "3", those daily reports?

A. Very similar.

Q. On any of those reports ceding insurance

(Testimony of John J. Beall.)

to you were you ever advised of the fact that the Union carried excess catastrophe contracts of any kind? A. Never.

Q. You knew they did?

A. I knew they did.

Q. Why would such information not appear on the dailies which you sent to them or the dailies which they sent to you?

A. Because of the general understanding it has no application to the pro rata reinsurance.

Mr. Dumett: Just a moment—well, go ahead.

Q. Who negotiated the reinsurance contract with the Union under which this reinsurance was ceded to them? A. I did, personally.

Q. When?

A. I believe the year was 1928. The place was Milwaukee, [104] Wisconsin and I was talking with Mr. Easton, the former vice-president.

Q. Do you recall his initials?

A. No, I do not.

Q. Is he now connected with that company?

A. I think he has retired.

Mr. Dumett: Eastman?

A. Easton.

Q. (Mr. Cook): And is that the same general contract under which this particular business was ceded to the Union?

A. If it is not the identical contract there has been no modification in its terms.

Q. What discussion at that time did you have with the Union concerning the method of reporting

(Testimony of John J. Beall.)

the number of risks, the method of your doing business with them, and the existence or non-existence of catastrophe reinsurance carried by you?

Mr. Dumett: Just a minute, before you answer. Go ahead. I am sorry I interrupted you.

A. I recall the question.

Q. Go ahead and answer it.

A. My meeting with Mr. Easton took place at the occurrence of the National Association of Mutual Companies at the Milwaukee convention. I recall Mr. Easton looking me up and proposing the relationship, and up to that time we had no relation, and I was not well acquainted with the company.

The Court: Can you not make it shorter?

Q. Try to be more brief in your answer.

A. I was trying to explain why I remembered it. He offered an equal line with us, and that seemed a surprisingly large amount for a company of its size, and I went into a great deal more detail than I normally would. [105]

Mr. Dumett: That was in 1928?

A. Yes.

Mr. Dumett: In view of that statement of the conversation, I think I should interpose an objection on the ground that the contract on which this suit is based is dated January 1st, 1940, and it is a well established rule that any oral agreements or understandings or negotiations that may have occurred prior to the date of the contract are merged in the contract and cannot be admitted to modify or extend a written contract.

(Testimony of John J. Beall.)

Apparently this is to show some understanding or agreement, express or implied, some oral agreement between the witness on the stand and the Union through an officer who is no longer with the company, all of which was long prior to the date of the execution of this written contract, and I submit it is not material at all and would have no effect on this written contract under the well known rule, and I object to it as irrelevant and immaterial.

Mr. Cook: This evidence is not offered to have anything to do with this contract at all, but it is being offered to show knowledge on the part of the defendant of the existence of this contract of catastrophe reinsurance.

The Court: Is that contract in evidence?

Mr. Cook: That is Plaintiff's Exhibit "1".

The Court: That objection is overruled. Be as brief as possible.

A. We had a complete discussion of our underwriting program and our theories along that line.

Mr. Dumett: Just a moment.

Mr. Cook: This goes merely to the fact that the defendant had knowledge of the fact that we carried such a contract, actual knowledge. [106]

The Court: You may proceed with the answer.

A. We had a complete discussion of our underwriting program and of the reinsurance each company carried.

Q. As a part of the discussion was the matter

(Testimony of John J. Beall.)

of catastrophe contracts of insurance discussed?

A. Yes, sir.

Q. Was he advised at that time of the Northwestern's policy of carrying such contracts?

A. He was.

Q. One thing further, please. The contract which is alleged in Paragraph 3 of the Amended Complaint, the reinsurance agreement with the Union, has that been cancelled, and if so when was it cancelled?

A. It has been cancelled.

Q. Do you have any document——

A. I have a letter from Mr. Legris notifying me of the cancellation.

A. The agreements governing cessions have been cancelled by letter dated January 8, 1942, giving us thirty days' notice of cancellation.

Q. There has been no new business written since that date?

A. That is right.

Q. But the cessions which were in force at the time of the cancellation were not affected in any way?

A. Not prior to their determination.

Mr. Cook: That is all.

Cross Examination

By Mr. Dumett: [107]

Q. I understand your testimony is that the caption PML, meaning probable maximum loss, while appearing on the daily report or certificate of cession covering the reinsurance in suit indicates, you say, there is more than one risk involved?

(Testimony of John J. Beall.)

A. Yes, sir.

Q. I think you said it indicates there were two risks?

A. 50% would indicate two and 25% would indicate four.

Q. And is that true wherever on your daily reports or certificates of reinsurance you indicate PML such and such percentage?

A. If it is less than 100% in our judgment there was more than one risk involved.

Q. Assume a building in the City of Seattle in the midst of one of our best fire districts, and assume it is a one-risk building, and assume another identical building, and again assume it is a one-risk building but out in a rural district away from fire protection, you might place an estimate of a different amount of probable maximum loss on those buildings? A. Probably not.

Q. It could be done?

A. My construction of the probable maximum loss means the fire department didn't get there. In other words, what happens if the fire department doesn't get there, and the existence of protection is not a consideration in fixing the PML.

Q. You don't consider that at all?

A. No, sir; not fire protection.

Q. But generally speaking it is so used by insurance companies, is it not?

A. Not by those with whom I am doing business and with which I am acquainted.

(Testimony of John J. Beall.)

Q. You never heard the term "PML" used in connection with fire protection facilities? [108]

A. No, sir.

Q. Does PML ever have any reference to the fire-proof nature of the building itself?

A. Very often, yes. If the fire proof construction is such to cut off fire areas of the building, a fire proof wall whether vertical or horizontal, will create a new risk.

Q. When you say the probable maximum loss with reference to a particular structure is so much you are in effect saying in your best judgment the greatest loss that can occur to that building is approximately so much?

A. Yes, sir.

Q. Your insurance may be in a larger amount and the actual amount of the value of the building may be a larger amount, but you do not consider the loss will run more than a percentage of it?

A. It is a percentage of the valuation subject to a single loss rather than the amount of the loss itself which it shown by the PML estimate.

Q. Have you any way of indicating to your reinsurers, as you do not use PML for that purpose, your judgment as to what the probable maximum loss is by virtue of fire-proof construction or lack of fireproof construction on a building?

A. Is that a question?

Q. Yes. A. I will have to have it read.

(Last question read.)

The PML will show our estimate of the per-

(Testimony of John J. Beall.)

centage of valuation involved in a single loss event. The size of our retention will give a pretty fair indication of what we think will be the normal loss as influenced by protection and the like.

Q. You use PML then to indicate your judgment as to the degree of risk as well as the number of risks involved? [109]

A. No, sir.

Q. What do you have to indicate the quality of the risk aside from the number of risks?

A. To our reinsurers?

Q. Yes.

A. Nothing else. They are given information as to the name of the risk and its occupancy.

Q. How would they get that?

A. By symbols on the report.

Q. As what?

A. The National Board grading, and P means it is protected and U means it is not, and B will indicate brick construction, and so on, and they are all understood by insurance men.

Q. You use those on your daily reports and certificates?

A. Yes, sir.

Q. I notice in this exhibit "3", which council showed you, the copies of the Northwestern reinsurance to the Union, in some of the cases you give PML 50%, and where you gave it 50% you say that indicates two risks?

A. Yes, sir.

Q. And when you give it 30% PML that is three?

A. Less than three—pardon me, more than three risks.

(Testimony of John J. Beall.)

Q. Where you say 30%

A. Yes, sir. If it was just three it would be 33-1/3.

Q. And you say 11%?

A. You would have to do a little quick mental arithmetic. It means 11% of the values are involved in the same fire area.

Q. It means a multiplicity of risks?

A. It means the values shall constitute one fire risk. That is on a fire risk there. One risk equals 100% PML.

Q. You do not have such a thing as one and one-half risks, you [110] would have one, two, three?

A. You might have two risks entirely separate, with 66-2/3 of your valuation in one and 33-1/3 in the other.

Q. Did you make the estimate as to the two risks on the Tacoma Narrows bridge?

A. No, sir, not personally. I participated in the discussion.

Q. And what was your segregation as to the two risks as your company found them in the bridge?

A. Not having actually worked out the PML I cannot answer specifically, but I know we considered that the approaches were quite a separate factor from the roadway and the piers were separate from the roadway.

Q. That is as definite as you can make it?

A. Yes, sir. It is not necessary there be a break of contact to make a separate risk.

(Testimony of John J. Beall.)

Q. I am asking what your company's definition of each of those two risks was. Did your company at any time prior to the time of the loss of the Tacoma Narrows bridge give the Union any statement other than the PML you referred to of 50% as to the two risks and defining those risks?

A. That is always the way you give that information.

Q. In other words you do not give it at all but by the PML? A. That is right.

Q. Now one of the major purposes of a net retention in a reinsurance treaty is to give a guarantee to the reinsuring company that the reinsured company, by reason of having a stake in the insurance, will use diligence in placing it?

A. Yes, sir.

Q. And in investigating and adjusting losses?

A. Yes, sir.

Q. And that is important from the reinsurer's standpoint? [111] A. Yes, sir.

Q. In the case of a reinsurance treaty such as is involved here the provision the reinsured shall not cede to the reinsurer more than the amount it retains net, and so forth—you recall that—it is important to the reinsurer in such a treaty to have the assurance that amount is retained, is it not?

A. Yes, sir.

Q. Would it make any difference—I will put it another way—assuming that the situation was reversed in this case; that the \$50,000 of reinsurance had been ceded by the Union to the Northwestern,

(Testimony of John J. Beall.)

and the Union had told the Northwestern it would retain the \$50,000—reversing the parties in the same contract—would not your company have been concerned if it found out subsequently to the cession that although the Union had represented it was retaining \$50,000 net that it had, without your previous knowledge, an excess catastrophe loss policy by virtue of which its top liability on the total loss of the bridge from a single catastrophe was say \$5,000, would you be concerned with that?

A. No, sir. I am certain every company that cedes us reinsurance has a catastrophe contract which may reduce its loss.

Q. Assuming a total loss on the Tacoma Narrows bridge and the Northwestern being the reinsurer, the Northwestern would have to pay \$50,000 in the case of a total loss in one catastrophe, and on the assumed facts I have given you the Union, by reason of the \$5,000 excess catastrophe policy, would only have to pay \$5,000, would not that concern you?

A. Yes, sir; it would. We could not treat that as catastrophe reinsurance—an excess of \$5,000.

Q. You would not? A. No. [112]

Q. I am asking you if it would be possible for a company to secure catastrophe excess loss policies that would say the reinsuring company would assume all liability over a first loss of \$5,000—that would be possible? A. As a possibility?

Q. Yes. A. That would be a possibility.

Q. I am asking you to assume in this case that

(Testimony of John J. Beall.)

you have made a cession of \$50,000 to the Union and the Union instead of retaining the \$50,000 would reinsure on everything over \$5,000 and on a total loss the Union would pay \$5,000 and you would pay \$50,000?

A. If they had shown me they were carrying \$50,000 on the PML?

Q. We will assume the same as you had.

A. 50% PML, meaning they had \$25,000 net on each risk but actually they did not have \$25,000 on each risk.

Q. I am assuming the same thing.

A. Except you brought in the \$5,000.

Q. And that \$5,000 maximum would result as \$32,000 does here from an excess catastrophe reinsurance, and you would be concerned with that difference between your \$50,000 and the Northwestern's \$5,000 loss on the bridge?

A. If it was down to \$5,000 I would be.

Q. Why?

A. Because \$5,000 is lower than the net retention carried by the Union. I would assume they had probably cut their retention on that risk.

Q. As a matter of fact then you would consider in such a case that where there was a representation that there was \$50,000 net retention that a non-disclosure of such excess catastrophe reinsurance would be a matter of concern to you? [113]

A. Of such catastrophe reinsurance.

Q. Is that only a difference in degree from the case that exists here?

(Testimony of John J. Beall.)

A. I cannot answer that without going into something that seems not to be in the case, and that is the practice of reducing lines below an average. If they were carrying an excess of \$5,000 as compared to all the business I would know about it before we accepted pro rata reinsurance.

Q. In the assumed case I have given you where the Northwestern paid \$50,000 and the Union paid only \$5,000 would not your real objection be because your insurance was ten times their reinsurance?

A. There would be a distinction between an objection and a failure to pay.

Q. I asked you if you discovered prior to the loss in the event of a total loss in one catastrophe you would have to pay ten times what your reinsured would have to pay you would feel considerably concerned?

A. Yes, sir.

Q. And it would make a lot of difference?

A. Yes, sir.

Q. I hand you for examination a document marked Defendant's Exhibit "A-10", and I will ask you if that is not a photostatic copy of a letter written by you to Mr. Legris on or about April 13, 1942?

A. Yes, sir.

Q. And is that not in response to another letter which I hand you, a photostatic copy of it, marked Defendant's Exhibit "A-11", from the Union to yourself?

A. Yes, sir.

Thereupon Defendant's Exhibit "A-10" and De-

(Testimony of John J. Beall.)

fendant's [114] Exhibit "A-11" were admitted in evidence. These exhibits were as follows:

DEFENDANT'S EXHIBIT "A-10:"

April 13, 1942.

Mr. J. M. Legris, Assistant Secretary
Union Mutual Fire Insurance Company
Grosvener Building
Providence, Rhode Island

Dear Mr. Legris:

I have only just returned to Seattle from a trip to Chicago to attend a specially called meeting of the Federation, and I find our copy of your circular release addressed "To Our Pro-Rata Reinsuring Companies."

Now I want to confer with my associates before giving you our decision. Frankly, I am much concerned about your new Excess of Loss Contract. It was my understanding that you formerly carried Excess of Loss or Spread Loss above the first retention of \$15,000.

I am sure that we have in force many lines of reinsurance where our liability substantially exceeds \$4,800. I am not happy about the possibility that we may be called upon to pay a loss of three or four times the net loss to your company. I will write you our decision in a short time.

Very truly yours,

(Signed) J. J. BEALL

Executive Vice President

DEFENDANT'S EXHIBIT "A-11":

April 1, 1942

To our Pro-Rata Reinsuring Companies:

Gentlemen:

As of today, April 1, 1942, our company has accepted the operation of a new excess of loss reinsurance contract whereby on some business outstanding, our net retention shall necessarily be different than entered on daily records corresponding, and also on certificates to your company upon pro-rata reinsurances ceded.

Briefly, our new excess of loss reinsurance contract provides for a set minimum net loss retention by the Union of \$4,800 each and every loss occurrence (not each and every risk), with an additional 10% loss possibility upon the provisional amount of excess of loss reinsurance.

Our outstanding pro-rata insurances with your company should not generally be affected by above new Excess of Loss reinsurance set up; however, we shall appreciate and thank you for your agreement to such set up, by your endorsement of one of the two copies of the enclosed amendment for attachment to reinsurance agreement affected thereby.

Very truly yours,

UNION MUTUAL FIRE INSURANCE COMPANY

By

Assistant Secretary. [116]

Memo—Letter on verso with amendment like attached, sent to the following on April 1, 1942:

By Air Mail	By Regular Mail
Northwestern (2 General 2 Canadian)	Stuyvesant
Employers Mutual	Berkshire
American Merchants	Skandinavia
Hardware Dealers	National F & M
Central Manufacturers	Rhode Island
Minnesota Implement	Merrimack
Mill Owners	Lumber Mutual
Minnesota Farmers	Pennsylvania Lumbermens
Midwestern	International
Implement Dealers	Holyoke
Cream City	Fitchburg
Atlas	United
Citizens Fund	Allied American
National Retailers	Towers, Perrin
Michigan Millers	Federal
Lumbermens	General Security
Indiana Lumbermens	1 Cedar St., N. Y. C.
Grain Dealers	Eagle—5—3 Foil
Western Millers	2 Regular

Amendment to Reinsurance Agreement dated—
between the—
and the Union Mutual Fire Ins. Co., of Providence,
R. I.

It is understood and agreed that, effective April 1, 1942, the Union shall have the right to carry Excess of Loss Reinsurance in respect to its own net retention upon risks written, and that, as regards pro rata reinsurances ceded by the Union prior to April 1, 1942, the advised net retained line of the Union on any one risk [116 a] shall not be considered as being reduced by any amounts recoverable from said Excess of Loss reinsurance.

In Witness Whereof the parties hereto have
signed this amendment

On April 1, 1942, on behalf of

UNION MUTUAL FIRE IN-
SURANCE COMPANY

by

Vice President

On April , 1942, on behalf of

by—

—————

The Court: The defendant reserves the right to
produce further testimony to be presented on the
amendment to the amended Complaint?

Mr. Dumett: That is, right, Your Honor.

Upon April 20, 1943, the trial was resumed,
whereupon the depositions of John D. Pryce, Frank
H. Newman, Edwin Stewart and Walter J. Thomp-
son were published and read. Mr. Dumett stated
that these depositions were offered without waiving
previous objections of the Defendant to the ma-
teriality of any evidence regarding custom and
usage.

In proceeding now with its rebuttal testimony,
the Defendant presents in evidence without waiv-
ing the objection heretofore made during the pre-
vious portion of the trial to the introduction of any
evidence bearing on custom or usage, and still re-
lies upon that objection, and submits this evidence
still reserving that objection. [116b] These deposi-
tions as read were as follows:

DEPOSITIONS

of

JOHN D. PRYCE,
FRANK H. NEWMAN,
EDWIN STEWART, and
WALTER J. THOMPSON,

witnesses called in behalf of the defendant, taken on the 3rd day of March, 1943, and continued on the 4th day of March, 1943, before Mr. Nathaniel Braun, Notary Public in and for the County of New York, State of New York, at No. 27 William Street (Suite 1002), in the Borough of Manhattan, City, County and State of New York, pursuant to the Order of Hon. John C. Bowen, Judge of the United States District Court herein, entered on February 25, 1943.

Appearances:

Messrs. DUNCAN & MOUNT,

representing the defendant,

by Arthur C. Muller, Jr., of counsel.

Messrs. SHANK, BELT, RODE & COOK,

representing the plaintiff,

by Jo Dudley Cook, Esq., of counsel.

JOHN D. PRYCE,

a witness herein, having been first duly sworn by the Notary, testified as follows:

(Deposition of John D. Pryce.)

Direct Examination

By Mr. Muller: [117]

Q. Will you kindly state your age, residence address and business address?

A. Age 51; residence, 2031 Locust Street, Philadelphia; business address, 12 South 12th Street, Philadelphia.

Q. In what business or occupation are you engaged, Mr. Pryce?

A. Reinsurance, brokerage business.

Q. What firm or firms are you associated with and in what capacity?

A. John D. Pryce & Company, Incorporated, Vice-President; also Towers, Perrin, Forster & Crosby, Inc., director.

Q. Will you kindly state the nature, character and extent of your experience in the insurance business, in general, and in the field of reinsurance, in particular?

A. Since resigning my commission in the English Army in 1920, I have been continuously engaged in the negotiating, handling and placing of insurance.

Q. Did you first start in England or did you first start in the United States?

A. In May, 1920, I started in this business with C. E. Heath & Company, Limited, London Lloyd's brokers of London, England. I remained with them approximately one year and then resumed the reinsurance business in the United States.

(Deposition of John D. Pryce.)

Q. And with whom were you first when you came to the United States?

A. Firstly, with Brown, Crosby & Company, Philadelphia, for approximately fifteen months; next with my own corporation as above in New York City until 1934. Since then in Philadelphia, as above.

Q. And almost entirely in the field of reinsurance, particularly, or in the insurance field, in general?

A. Almost entirely in the reinsurance field.

[118]

Q. Have you at my request examined a photostatic copy of a reinsurance treaty between Northwestern Mutual Fire Association and Union Mutual Fire Insurance Company, dated January 1, 1940, and which is set forth in the amended complaint filed in this action?

A. I have

Q. And have you also at my request examined a photostatic copy of a policy between Northwestern Mutual Fire Association and Underwriting Members at Lloyd's, Policy No. D30477 and designated Plaintiff's Exhibit 1?

A. I have.

Q. As a basis of my questions which follow, I refer to both of those contracts and request that you assume the following facts:

Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified

(Deposition of John D. Pryce.)

upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000. Subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P.M.L." was 50%. Also assume that Northwestern specifically reinsured all but \$50,000 of said \$350,000 of insurance, and also assume that at the time Northwestern made said cession to Union, the Northwestern was reinsured under an existing excess of loss [119] reinsurance policy, No. D-30477, a photostatic copy of which you read, and assuming that Northwestern in making said cession of \$50,000 to Union and in computing and advising Union, in said Certificate of Reinsurance, No. 10852, of Northwestern's net retention considered only specific reinsurance and gave no consideration to the excess of loss reinsurance policy No. D-30477. Will you kindly state what is the meaning in the insurance business of the term amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company as used in the reinsurance treaty of January 1, 1940, between Union and Northwest-

(Deposition of John D. Pryce.)

ern and numbered Article VIII, having in mind the custom and usage of the insurance business?

A. It would be considered as the amount retained net on that property by the Northwestern Mutual after deducting all the amounts recoverable from all reinsurance.

Q. And what do you mean by the term retained net?

A. In my opinion retained net means that amount which the insuring company retains at its own net risk after deducting all reinsurances.

Q. Will you also kindly state and explain, based on the assumed facts, what consideration under the customs and usage of the insurance business should or would be given by the ceding company to an excess of loss policy, such as Exhibit 1, if any, in computing and advising its treaty reinsurer under a treaty provision such as is set forth in Article VIII of the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company?

A. The said company—the ceding company, rather, should consider [120] that its net retained liability is reduced by the coverage afforded by the excess contract to that property.

Q. With respect to the net retention provision of Article VIII of the reinsurance treaty between Union and Northwestern, state whether or not that particular form of net retention provision, or the substance of it, is a uniform provision customarily

(Deposition of John D. Pryce.)

included in all reinsurance treaties, or whether or not under the customs and usage of the insurance business such net retention provisions vary in form, and, if so, how and in what respect and to what extent they vary?

A. The provision is quite usual and customary.

Q. Will you kindly state and explain to what extent, if any, is the custom or usage in the insurance business with respect to the computation and statement of net retention by a reinsured company to its treaty reinsurer dependent upon the particular wording of the net retention provision in the reinsurance treaty?

A. The statement as to net retention made by the ceding company is of the utmost importance to the reinsuring company. The ceding or "originating" company would have all underwriting details of the risk or property involved. The reinsuring company would not have such details, and would therefore rely on the underwriting judgment of the ceding company as to size of a line which could conservatively be retained on a given risk.

Q. In view of the assumed facts, and taking into consideration the provisions of Northwestern's excess of loss policy, Exhibit 1, can you compute the highest possible loss which Northwestern could sustain at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge?

A. Their maximum net retained loss would be \$32,000, being a first [121] loss of \$30,000 plus 10% of the remaining \$20,000.

(Deposition of John D. Pryce.)

Q. What is the meaning in the insurance business, in view of the customs and usages of that business, of the term "P.M.L." as used in the Certificate of Reinsurance, or Daily Report, No. 10852, transmitted by Northwestern to Union, and for what purposes is the term "P.M.L." customarily used by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies, and I show you a photostatic copy of the reinsurance certificate No. 10852?

A. The letter "P.M.L." means probable maximum loss. This is a symbol commonly used by an insurance underwriter. It expresses [122] his judgment as to the probable maximum damageability of the risk from the peril insured against. In a cession binder from the insuring company to the company accepting the reinsurance the "P.M.L." estimate, which is usually shown with the letters "P.M.L." followed by a percentage, indicates the ceding company's judgment as to the probable maximum damageability of that risk. The company accepting the cession is guided thereby as to the amount of the cession which it will retain net for its own account and as to how much it should retrocede to other companies.

Q. To what extent, if any, is the term "P.M.L." used to indicate the number of risks involved by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?

(Deposition of John D. Pryce.)

A. It is not so used at all in my opinion.

Q. Under the customs and usages of the insurance business in what manner, if any, do reinsuring companies indicate the number of risks involved in making cessions of reinsurance under reinsurance treaties to their reinsurers?

A. Usually by making separate cessions for separate risks. In some cases by specifying the number of risks and in such cases usually indicating the largest valued risk in the cession.

Q. State briefly the various types and kind of reinsurance?

A. To my mind the principal types of reinsurances can be divided into two main headings: One being pro rata reinsurance, sometimes called specific reinsurance; the other main class is excess of loss reinsurance. The first class is a plan of sharing an amount of insurance so that the reinsured company and its reinsuring companies share in any loss in the same proportion as their own individual share of the risk. Excess of loss reinsurance is plan by which the reassured assumes a [123] first loss of an agreed figure and the reinsurers are only involved for the amount in excess of the reinsured company's first loss retention.

Q. Now, I ask you in what class would you place treaty reinsurance?

A. Treaty reinsurance would come within class specified number one above.

Q. And retrocession?

A. Also in class number one.

(Deposition of John D. Pryce.)

Q. Will you please state what type or kind of reinsurance is represented by Plaintiff's Exhibit 1, policy No. D-30477?

A. Excess of loss reinsurance.

Mr. Muller: That is all.

Cross Examination

By Mr. Cook:

Q. Mr. Pryce, I understand that your work is that of an insurance broker? A. Yes, sir.

Q. And all of your experience in the insurance business has been that of a broker?

A. Yes, sir; but I have had a great deal of contact with executives of insurance companies.

Q. That is in connection with your brokerage work?

A. More correctly I would say in connection with negotiation of reinsurance contracts.

Q. Just what is the nature of your work in negotiating these reinsurance contracts?

A. The nature of my work is to analyze the reinsurance requirements of an insurance company and to design a contract of reinsurance which will fit those requirements.

Q. Does that apply to both specific reinsurance and excess of loss reinsurance? [124] A. Yes.

Q. Referring only to the specific reinsurance contracts, what experience have you had in the way that one company reports or cedes to another company a certain amount of specific insurance?

A. This is the most elementary type of reinsur-

(Deposition of John D. Pryce.)

ance and any reinsurance broker or advisor necessarily has considerable experience as to the nature and usage of such covers.

Q. I am interested particularly in the mechanics of how a certain amount of specific insurance is ceded to a reinsuring company. Can you explain that?

A. The insuring company, in accordance with the terms and conditions of its reinsurance treaty with another company will cede amounts of insurance and will establish those cessions by sending the reinsuring company a binder with brief details (as called for by the treaty) of the risk concerned. These details are usually confirmed monthly by bordereaus which list the cessions made during the preceding month.

Q. And premiums, of course, are paid on the basis of those bordereaus usually? A. Right.

Q. What experience have you had in the actual mechanics as you have described them of one company ceding specific insurance to another?

A. Considering Lloyd's underwriters as what you call a company, I have handled many such treaties throughout my entire experience.

Q. You speak of treaties, that is, the actual reinsurance treaty that you speak of that you handled?

A. I mean treaties and I have also handled many specific items of reinsurance. [125]

Q. When a company cedes a specific amount of insurance to its reinsuring company what is the

(Deposition of John D. Pryce.)

custom in regard to advising that company of their various excess of loss policies?

A. May I ask do you mean under a treaty or a specific risk which is not covered by a treaty.

Q. Under a treaty.

A. If there is any excess of loss reinsurance covering the risk concerned the ceding company would or should mention that fact. If under a treaty then the treaty should itself state whether or not it is permissible for the ceding company to protect itself by excess of loss reinsurance.

Q. Is that advice given on each daily report ceding specific insurance?

A. Speaking for my office it is unless it is under a treaty where such permission exists.

Q. I am not referring to your office; I am referring to one insurance company dealing under a treaty with another insurance company?

A. I believe it is customary.

Q. Did you ever see such a daily report with that information on it? A. Yes I did.

Q. What company made the report?

A. One of the Reciprocal Exchanges under the management of Ernest W. Brown, Incorporated, New York. I have doubtless seen others but cannot recollect the particular names of the companies.

Q. This report you speak of was made to what reinsuring company?

A. To Lloyd's Underwriters.

Q. Under a specific reinsurance treaty?

(Deposition of John D. Pryce.)

A. Under both a specific treaty and other similar reports for [126]

Q. Is that the only instance you can specifically thing of? A. At the moment, Yes.

Q. How general in the insurance world, Mr. Pryce, is the practice of carrying catastrophe reinsurance or excess of loss reinsurance of the type displayed here by Plaintiff's Exhibit 1?

A. I would say that it is quite general for insurance companies to carry catastrophe reinsurances. It is also quite general for companies to carry excess of loss reinsurances, but excess of loss reinsurances are by no means all catastrophe reinsurances, and if you are referring particularly to Exhibit number 1, I would call this an excess of loss reinsurance but not a catastrophe reinsurance.

Q. What is the distinction which you draw between those two types?

A. A catastrophe reinsurance, in my opinion, is a contract which protects a company against losing a very substantial sum of money in one loss occurrence.

Q. Is that the amount that is covered by Exhibit 1? A. In my opinion, no.

Q. Why not?

A. Because in my opinion a loss of \$30,000 to a company of the size of the Northwestern Mutual would not be a catastrophe nor for that matter would a loss of \$50,000.

Q. That policy Exhibit 1 does not apply to any specific risks, does it? A. No, sir.

(Deposition of John D. Pryce.)

Q. And it does meet the other part of your definition, namely, that it is a loss occasioned by one event or one cause. Is that not true?

A. To that extent it does.

Q. In other words, your loss must occur before you can determine [127] whether or not Plaintiff's Exhibit 1 will be brought into play?

A. I believe that would be true of practically any reinsurance contract.

Q. It is true of that particular contract, Exhibit 1, isn't it? A. Yes, sir.

Q. In other words, before you can determine whether this policy will apply you must first have the loss and know the extent of it and the cause?

A. I would say naturally.

Q. It is different in that respect than a policy covering a specific property, isn't it?

A. No, sir; not in my opinion.

Q. It is not? A. No sir.

Q. Possibly I don't make myself clear. A policy covering a specific property of course insures that specific property against a risk, while this policy, Exhibit 1, insures a company against a loss to all property, assuming the loss is sufficiently large to bring this in play?

A. My answer would be this policy can obviously be involved in a loss on a single risk, and I know of no contract which can properly be called a catastrophe reinsurance contract if it can be involved where one risk only of the reinsured company is damaged or destroyed in the loss occurrence.

(Deposition of John D. Pryce.)

Q. Mr. Pryce, you are familiar, I assume, in a general way at least, with the Tacoma Narrows Bridge loss? A. Generally.

Q. On the Tacoma Narrows Bridge the Northwestern issued a policy for \$350,000 and specifically reinsured all but \$50,000. Now, bearing in mind the existence of Plaintiff's Exhibit 1, assume that the same windstorm destroyed another bridge in the same [128] vicinity upon which the Northwestern had an identical policy and had made identical cessions of specific reinsurance, what would have been the Northwestern's net retention on the Tacoma Bridge? A. Which reinsurance contract?

Mr. Muller: Which one are you referring to?

Q. What would have been the Northwestern's net retention on the Tacoma Bridge?

Mr. Muller: Under what policy?

Mr. Cook: Under the policy they wrote on the Tacoma Bridge.

A. \$32,000.

Q. How did you compute that?

A. I don't quite get the point of your question.

Q. How would you compute the net retention of \$32,000?

A. Because that was the amount which they retained net after deducting all other reinsurance.

Q. All right. What would have been their net retention on the other bridge upon which they carried an identical policy?

A. I think you have to ask such a question in re-

(Deposition of John D. Pryce.)

lation to the term net retention as applied to a particular reinsurance contract.

Q. I have asked you to assume the identical policies, that the identical policies were involved in the second bridge as well as on the Tacoma Narrows Bridge and that both bridges were destroyed by the same event. You say the net retention on the Tacoma Bridge under those circumstances would be \$32,000, and now I ask you what would be the net retention on the other bridge which was destroyed by the same wind?

A. For purposes of expressing the net retention to their specific reinsurers their net retention on the other bridge [129] would also be \$32,000.

Q. Yet they would not have paid \$32,000 on that assumed state of facts on the loss, would they?

A. Do you mean because of their excess loss contract?

Q. Yes, sir.

A. I would say it would not be possible to specify as to which bridge they paid a net loss of \$32,000.

Q. I think that is probably correct. How much on that assumed state of facts would the Northwestern actually pay on both bridges?

Mr. Muller: Assuming a total loss?

Mr. Cook: Yes, sir.

A. Do you mean how much would they pay or how much would the net cost to them be?

Q. What would their net loss be?

A. Under this Lloyd's contract, under Exhibit 1, it would be \$32,000.

(Deposition of John D. Pryce.)

Q. That would be a total net loss to the Northwestern of \$32,000 on both bridges? A. Yes.

Q. And as you say it would be impossible to say on which particular bridge the \$32,000 was to be paid? A. Yes.

Q. Does it not follow then, Mr. Pryce, that under your definition it would be impossible to know what a company's net retention was until after a loss was incurred if you take into consideration this Lloyd's excess policy, Plaintiff's Exhibit 1?

A. I agree and that is why I do not consider this policy as a catastrophe cover.

Q. Regardless of what you considered under this Exhibit 1, do you agree that the net retention of the Northwestern cannot be de- [130] terminated until after a loss has occurred?

A. I do not. I would say their net loss cannot be determined until after the loss has occurred.

Q. Can you then tell me on that assumed state of facts what their net retention on each of those two bridges would be?

A. I would say that their net retention on each of those bridges subject to excess of loss reinsurance was \$50,000 on each bridge.

Q. The net retention you say would be \$50,000 subject to this excess contract. Is that correct?

A. Yes.

Q. And in ceding specific reinsurance under those conditions they should advise the reinsuring company that their net retention was \$50,000 subject to this excess policy, Plaintiff's Exhibit 1?

(Deposition of John D. Pryce.)

A. Right. If they had said that there could be no question as to the propriety of this particular cession.

Q. In other words, referring to the telegram of June 10, 1940, from Northwestern to Union, which is Exhibit either A-1 or A-2, wherein the Northwestern advised "we will retain \$50,000," if I understand your position correctly, that cession would be perfectly proper and in accordance with the insurance practice if they had gone on and said "subject to excess policy with Lloyd's," referred to in this record as Exhibit 1?

A. I would say that if Northwestern had stated in their telegram that they would retain \$50,000 subject to excess of loss reinsurance, and that if Union Mutual had agreed to accept \$50,000 on that basis, then the matter would have been entirely in order.

Q. That, of course, raises the question of what knowledge the Union Mutual had of the existence of this policy, Exhibit 1. Is that not right? [131]

A. If the Union Mutual were not aware of the excess reinsurance which the Northwestern had, they would have asked at that juncture.

Q. In other words, if the Union Mutual knew that the Northwestern carried the policy referred to as Exhibit 1, then of course it would have been an idle gesture to advise them of that fact again?

Mr. Muller: I assume in connection with the treaty.

Mr. Cook: Yes.

(Deposition of John D. Pryce.)

A. If the Union Mutual had been aware of the exact coverage afforded by the excess treaty and had previously agreed that cessions were acceptable with the protection of that excess, I still think Northwestern to be on the safe side should have mentioned this excess treaty when requesting permission to cede \$50,000 on the Tacoma Bridge. Furthermore, I think the treaty between Northwestern and the Union Mutual should have contained a clause permitting the existence of the excess. This is a general precaution in all contracts I have arranged.

Q. I don't believe you have yet answered my question specifically, Mr. Pryce, and that is, referring to this telegram above identified, if the Union Mutual knew of the existence of Plaintiff's Exhibit 1, then the words, "we will retain \$50,000," would to them have meant \$50,000 retention subject to Plaintiff's Exhibit 1, would it not?

A. I would not be too sure of that.

Q. Going back to a previous question, in which we agreed that it is practically a universal practice for insurance companies to carry excess reinsurance in some form or another?

A. It is very general.

Q. Do you know of any company that does not carry some type of excess coverage? [132]

A. Not offhand.

Q. It is recognized, is it not, in the insurance world that all companies do carry some type of excess coverage?

(Deposition of John D. Pryce.)

A. The majority do.

Q. That is one indication of good management on the part of an insurance company, would you so state?

A. Good and conservative management.

Q. You are familiar, of course, with Best's Reports, are you not? A. Yes.

Q. That is an accepted book in the insurance world? A. I believe so.

Q. Used quite universally, is it not?

A. I would say so.

Q. And in that book the various types of excess coverages carried by the different insurance companies are described?

A. In some cases.

Q. You don't know, I assume, whether the excess coverages as carried by the Northwestern were described in Best's Reports? A. Probably.

Q. Do you make any distinction, Mr. Pryce, between net loss and net retention?

A. They are two entirely different things. The net retention usually refers to a risk, whereas a net loss indicates the net loss of an insurer.

Q. The reason I ask that was to ask this: Isn't it a fact that this Lloyd's policy, Exhibit 1, affects the net loss of the company rather than its net retention on a specific piece or property?

A. I would say that if the Northwestern's net retention on a risk is more than \$30,000 it is obvious that this excess policy could be involved in a loss on one risk alone. [133]

(Deposition of John D. Pryce.)

Q. Well, you possibly don't follow me, but in the insurance world, and I am speaking of the meanings of these terms, is it a fact that excess coverages do not affect what is known as net retention but do affect what may be the ultimate net loss which the company may sustain?

A. I would say that as regards the excess of loss reinsurers one is concerned with the ultimate net loss of the reassured, but as regards the treaty reinsurers one is concerned with the net retention of the reassured.

Mr. Cook: That is all.

Redirect Examination

By Mr. Muller:

Q. When Mr. Cook asked you whether the excess of loss did not affect the net retention, did not the answer to that question depend upon the limits retained net by the Northwestern? In other words, the application depends upon the attachment point of the excess of loss coverage as to whether it would affect the retained line?

A. That is correct.

Q. So that when Northwestern retained net \$50,000, that retention would not have been affected by their excess catastrophe policy, except that the attachment point was within that net retention, namely, 90 per cent excess of \$30,000?

A. Yes.

Q. Is it usual for a catastrophe policy to be written which would affect the normal retained net

(Deposition of John D. Pryce.)

lines of the originating company on any one risk?

A. It is unusual and I would not call such a policy a catastrophe policy.

Mr. Muller: That is all.

Mr. Cook: I have nothing further. [134]

FRANK H. NEWMAN,

a witness herein, having been first duly sworn by the Notary, testified as follows:

Direct Examination

By Mr. Muller:

Q. Will you kindly state your age, residence address and business address?

A. Age 51; residence address 104 Tullamore Road, Garden City, New York; business address 1 Cedar Street, New York City.

Q. In what business or occupation are you engaged?

A. Reinsurance, fire and allied lines.

Q. With what firm or firms or companies are you associated and in what capacity?

A. Only one,—as Vice-President of the General Securities Insurance Corporation.

Q. Will you kindly state the nature, character and extent of your experience in the insurance business, in general, and in the field of reinsurance, in particular?

A. Thirty-nine years in the insurance business. In the past thirteen years in reinsurance with my

(Deposition of Frank H. Newman.)

present firm, which prior to August 1, 1941 was known as the General Fire Assurance Company. I was with the Continental Insurance Company for a period of fourteen years, and ten years with the Liverpool, London & Globe Insurance Company; and two years with the National Board of Fire Underwriters as a boy.

Q. Have you at my request examined a photostatic copy of a reinsurance treaty between Northwestern Mutual Fire Association and Union Mutual Fire Insurance Company, dated January 1, 1940, and which was set forth in the amended complaint filed in this action by the Northwestern?

A. Yes, I have.

Q. Have you at my request also examined a photostatic copy of a [135] policy of Northwestern Mutual Fire Association with Underwriters at Lloyd's, known as Plaintiff's Exhibit 1?

A. Yes, I have.

Q. As the basis of the questions to follow, I refer to both of those treaties or contracts and request that you assume the following facts:

Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma, in the State of Washington, in the sum of \$350,000. Subsequently, and also in the lat-

(Deposition of Frank H. Newman.)

ter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P. M. L." was 50%—

A. Meaning probable maximum loss, I suppose.

Q. Yes. (Continuing) Also assume that Northwestern specifically reinsured all but \$50,000 of said \$350,000 of insurance, and also assume that at the time Northwestern made said cession to Union, the Northwestern was reinsured under an existing excess of loss reinsurance policy, No. D-30477, and assuming that Northwestern in making said cession of \$50,000 to Union and in computing and advising Union, in said Certificate of Reinsurance, No. 10852, of Northwestern's net retention considered only specific reinsurance and gave no consideration to the excess of loss reinsurance policy No. D-30477. Now, will you kindly state what is the meaning in the insurance business of [136] the term amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company, as used in the treaty between Northwestern and Union in Article No. VIII thereof, having in mind the usage and customs of the insurance business?

A. To me it means the amount of dollar liabil-

(Deposition of Frank H. Newman.)

ity on a risk after the application of all reinsurance, that is, the amount of money which the ceding company—that is, it means the amount of money which the ceding company would have to pay out of its own pocket if the risk were a total loss.

Q. Will you please state and explain based on the assumed facts what consideration under the customs and usage of the insurance business should or would be given by the ceding company to an excess of loss policy such as Exhibit I in computing and advising its treaty reinsurer under a treaty provision such as is set forth in Article VIII of the treaty between Northwestern and Union?

A. This treaty, if I read it correctly, has nothing to say about excess or catastrophe covers as carried by the Northwestern. So that I, or anyone else, as I see it, would be justified in understanding that the Northwestern carried \$50,000 net without reinsurance as defined in the preceding testimony on the risk, but this was not the case for their catastrophe or excess cover meant that they could not lose in excess of \$30,000 plus 10% of any part falling to the share of the Lloyd's cover.

Q. With respect to the net retention provisions of Article VIII of the reinsurance treaty between Union and Northwestern, state whether or not that particular form of net retention provision, or the substance of it, is a uniform provision [137] customarily included in all reinsurance treaties or whether or not under the customs and usages of the insurance business such net retention provisions vary in

(Deposition of Frank H. Newman.)

form, and, if so, how and in what respect *to* they vary?

A. My answer is yes. Of course, I have seen plenty of treaties which in conjunction with "net retention without reinsurance" grant permission for conflagration covers which shall not affect the defined net retentions on the individual risk, and it must be borne in mind together with the preceding that a catastrophe cover as such is designed to protect the aggregate of a company's nets, and that a real conflagration cover is usually in excess of a very sizeable first loss retention, whereas the first loss retention of \$30,000 in the Lloyd's cover under discussion is quite a low first loss retention for a company the size of the Northwestern. The real catastrophe cover is in excess of a first loss retention high enough so that the individual risk is seldom affected, but, naturally, wherever the ceding company retains dollar liability in excess of the first loss retention as specified in the excess or catastrophe cover, they know that their retention is reduced below the amount retained.

Q. When you used the term "conflagration cover" did you mean catastrophe? A. Yes.

Q. Will you kindly state and explain to what extent, if any, is the custom or usage in the insurance business with respect to computation and statement of net retention by a reinsured company to its treaty reinsurer dependent upon the particular words of the net provision in the reinsurance treaty?

(Deposition of Frank H. Newman.)

A. I would answer that by being specific, that in this treaty there being no statement of conflagration or excess covers [138] carried by the ceding company, that net retention meant as stated in the first part of this testimony—the actual amount of dollar liability which the ceding company would be out of pocket if the risk were a total loss.

Q. Taking into account the assumed facts again, and also taking into consideration the provisions of the Northwestern's excess of loss Policy No. D-30477, can you compute the highest possible loss which the Northwestern could have sustained at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge?

A. This is a 90%, isn't it?

Mr. Cook: Yes.

A. (Continuing) \$32,000 being the first loss. Retention of \$30,000, and 10% of the other \$20,000 retained by the Northwestern. [139]

Q. What is the meaning in the insurance business, in view of the customs and usage of the business, of the term "P. M. L." as used in the Certificate of Reinsurance No. 10852 transmitted by Northwestern to Union, and for what purpose is the term "P. M. L." customarily used by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies, and I show you a photostatic copy of the Certificate of Reinsurance referred to?

A. Probable maximum loss means nothing more than the amount subject.

(Deposition of Frank H. Newman.)

Q. What is meant by the amount subject?

A. It is that percentage or dollar part of the net retention which the expected loss should not exceed.

Q. And how is that sum computed? How is the "P. M. L." computed?

A. The amount subject on a risk, or the "P. M. L.", is a matter of underwriting judgment, usually, however, based upon inspection reports.

Q. To what extent, if any, is the term "P. M. L." used to indicate the number of risks involved by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?

A. I cannot see that "P. M. L." as a term means anything in connection with a number of risks explanatory thereof on the part of the ceding company to the reinsurer.

Q. Under the customs and usages of the insurance business in what manner, if any, do reinsuring companies indicate the number of risks involved in making cessions of reinsurance?

A. Each cession by the ceding company to the reinsurer constitutes a risk unless the ceding company has elected to consider several buildings as constituting one risk, or it might be that what would normally be one risk would be written under [140] two scheduled forms, and the ceding company might or might not indicate to the reinsurer that they had fixed their net retention over the group, but of course the amount ceded would depend upon the net

(Deposition of Frank H. Newman.)

retention as fixed. In this case on a group risk and according to the treaty limitations.

Q. Are there many types of kinds of reinsurance?
A. Yes.

Q. Will you kindly mention several of them at this time?

A. Reinsurance, according to my knowledge, falls in two main classifications: Pro-rata reinsurance; and reinsurance arranged on an excess of loss basis.

Q. Is Plaintiff's Exhibit 1, Policy No. D-30477, a type or kind of reinsurance, and, if so, what type or kind of reinsurance?

A. Yes. It is a catastrophe cover or excess of loss cover, whichever term is preferred, on an excess of loss basis against a constant first loss retention by the ceding company where more than one risk or group of risks are involved in the same disaster. It may cover only one risk, especially where the first loss retention is so low.

Mr. Muller: That is all I have.

Cross Examination

By Mr. Cook:

Q. Mr. Newman, your company is now known as the General Securities Assurance Corporation?

A. Yes.

Q. Does that company deal exclusively in reinsurance contracts?

A. Exclusively in reinsurance.

Q. How many contracts of reinsurance do you

(Deposition of Frank H. Newman.)

have in force or does your company have in force?

A. This is not exact,—but in the neighborhood of fifty or more.

Q. And those, I assume, are both specific reinsurance and [141] catastrophe contracts?

A. We do not write any catastrophe.

Q. All specific?

A. All pro-rata or contributing reinsurance.

Q. Pro-rata reinsurance and specific reinsurance means the same thing, doesn't it?

A. Terms become so confused in this business. Pro-rata to me is just the distinction between the work-out of the payment on the part of the reinsuring company as contrasted with the excess of loss arrangement which does not contribute until the first loss retention is exceeded.

Q. The treaty between Northwestern and the Union is what is known as pro-rata reinsurance?

A. Yes.

Q. Are the contracts which your company holds with these fifty odd insurance companies for pro-rata reinsurance similar in nature to the treaty existing between the Northwestern and Union?

A. Yes, there are a great many variations, however.

Q. But they are generally of the same type?

A. Yes. The wording of the clauses may be different.

Q. What investigation do you make of a company prior to the time you enter into a reinsurance treaty?

(Deposition of Frank H. Newman.)

A. We wish to know if it is a stable company, which is generally apparent from an examination of the last statement. We wish to know in what position we are ceding our reinsurance, whether it is a first surplus treaty, and we wish to know very definitely the net retentions, if, as is true in nearly all cases, the capacity which we obligate ourselves to is based upon the net retention.

Q. That is the net retention of the ceding company? [142]

A. Of the ceding company. We particularly wish to see the form and wording of the proposed treaty, which should be prepared for examination by the reinsurer on the part of the ceding company or its broker.

Q. Now, in the investigation you say the net retention of the ceding company is of course very important to you? A. Yes.

Q. Do you in that investigation find out what catastrophe covers such a company carries?

A. We have and we have not. It depends largely upon the company and the treaty wording submitted.

Q. The carrying of some kind or some form of a catastrophe policy is practically universal among insurance companies?

A. It is generally assumed and practically universal.

Q. And it is assumed you started to say I suppose by anyone dealing with another insurance com-

(Deposition of Frank H. Newman.)

pany that they do carry some kind of a catastrophe cover? A. Yes.

Q. That is a matter of common knowledge in the insurance world? A. Yes.

Q. Can you tell me off-hand where the information regarding that kind of catastrophe cover would be available to one trying to determine that question?

A. It might be volunteered by the ceding company or specific questions on this point might be asked by the prospective reinsurer, but it would seem to me, at lease, that the larger the company the more responsibility they should feel of notifying the prospective reinsurer if there is a low first loss retention on any catastrophe or excess cover which would affect the individual nets, and assuming that they intended to quote nets to the ceding company higher than the [143] first loss retention and against which the ceding company might be accepting one or more net lines.

Q. That information is also aavilable in many publications, is it not?

A. I do not think it is authoritative in any publications. Best's, of late years, is giving some detail along these lines, but to be specific that is a question which Best's asks for their book but which there is no obligation upon the company to give in detail and which is not always given in detail or completely.

Q. Do you happen to know what Best's report

(Deposition of Frank H. Newman.)

shows concerning the excess contract, Exhibit 1, carried by the Northwestern Mutual Fire?

A. I didn't read it.

Q. If I should tell you that the details of this specific coverage, Exhibit 1, has been published in Best's for a matter of some fourteen or fifteen years, I believe, would you not say that the fact that they did carry such a policy with those limits would be a matter of general knowledge in the insurance world or to anyone interested in that question?

A. If I had read such detail I would certainly query the company offering the treaty, but this in my mind does not excuse a company offering reinsurance under a treaty from frankly stating where they have a low first loss retention under catastrophe or excess cover.

Q. I don't believe you have answered the question. You have more or less argued what the Northwestern should or should not have done.

A. The answer is it would definitely be a matter of knowledge to anyone interested enough to look it up and read it.

Q. And I assume that if you were negotiating a reinsurance treaty [144] with the Northwestern or with any other company you would undoubtedly refer to Best's for some information about it, wouldn't you?

A. We often do consult Best's.

(Deposition of Frank H. Newman.)

Q. Assuming that you knew of the existence of this catastrophe policy, Exhibit 1, and the Northwestern ceded to you, as evidenced by this Daily Report No. 10852, \$50,000 of coverage on a risk with advice that they retained an identical \$50,000, you would, of course, know that their retention of \$50,000 might be—you would know that the amount of their loss on that amount of \$50,000 might be affected by the existence of this Exhibit 1?

A. Yes, but I would also have asked them to reduce the line to approximately \$30,000 because they were not to cede more than their net retention, but it is broader than this because there is also windstorm cover, and in my mind I would be choosing between asking them to reduce not only to \$30,000 but possibly to \$12,500.

Q. But if you knew all of these facts and did not request the reduction and accepted the \$50,000 ceded, you of course would be liable in that amount in the event of a loss, wouldn't you?

A. Yes, except that this answer is affected by the usual wording in treaties that if the capacity of the treaty limit is exceeded the ceding company is obligated to revise its net according to the limitations in the contract in question. Whether that clause is in this contract or not I would have to see and read it.

Q. Now, as I understood you, Mr. Newman, you said that net retention to you meant the amount of dollars that a company would have to pay if there was a total loss on the risk?

(Deposition of Frank H. Newman.)

A. It would have to pay out of its own pocket after collecting [145] all reinsurance.

Q. In other words, net retention according to your redefinition is that amount of money which the ceding company itself pays in the event of a total loss? A. Not the gross amount.

Q. The net amount that the company itself pays?

A. That is right. I would like to add that net retention to me, and I believe to all American underwriters, means the same thing as the Lloyd's phrase, "ultimate net retention."

Q. You apparently draw no distinction between net retention and net loss? A. No.

Q. There is none in your judgment?

A. They are not analogous. Net retention is the dollar amount retained on a risk which the company is willing to lose net. You will have to come back to your question a minute. I am not sure I get the exact wording. No distinction between what?

Q. Net loss and net retention?

A. (Continuing): Whereas the net loss is merely the amount of loss they are called upon to pay on that net retention.

Q. Very well. Now, under your definition of net retention, and dealing with the specific problem at hand, you say the net retention of the Northwestern on that Tacoma Bridge would be \$32,000?

A. On the understanding that they reinsured

(Deposition of Frank H. Newman.)

outside all except \$50,000. They only wrote \$20,000 against the cover.

Q. That is based on the assumed facts which Mr. Muller stated to you? A. Right.

Q. Now, I want you to assume: we will call the Tacoma Bridge, Bridge A, and the Northwestern had this coverage on it that [146] has been described to you and these other reinsurance treaties were in effect. Assume that ten miles from there was another bridge, which we will call B, upon which the Northwestern had an identical duplicate set of policies. Suppose this same windstorm had blown down and destroyed to a total loss both bridges A and B, what would have been the net retention of the Northwestern on bridge A?

Mr. Muller: Under the Union Mutual policy?

Mr. Cook: Under the form which the reported here.

A. The two bridges in the illustration are one risk in the event of disaster under the catastrophe policy. They are two risks when it comes to passing off pro-rata reinsurance. That seems admitted in the question itself, for the hypothesis is that the Northwestern has a net retention or retained amount of \$50,000 on each bridge. The two contracts, excess of loss and pro-rata reinsurance, have an entirely different application.

Q. My question was what would be the amount of the net retention of the Northwestern under your definition on the first bridge A?

Q. I will have to ask you when you say what

(Deposition of Frank H. Newman.)

would be the net retention,—the net retention to which company? The Lloyd's underwriters or the Union Mutual?

Q. To the Union Mutual.

A. I would understand under the treaty wording that the net retention on each bridge as given to the Union Mutual was \$50,000 by the Northwestern.

Q. On each bridge?

A. Individually. Each bridge individually.

Q. In the event that both bridges were destroyed to a total loss, which I assumed in my question, they would pay only on both bridges \$37,000, wouldn't they? [147]

A. Under the excess of loss contract, that is correct.

Q. Can you segregate any part of that to each individual bridge as net retention?

A. Yes, indeed.

Q. Wouldn't their net retention in that event be only \$18,500 on each bridge? A. No.

Q. How much would it be?

A. \$50,000 so far as the retention quoted to the Union because you cannot compare the workout on a spread loss.

Q. I don't follow you. I thought you said that because of the existence of Exhibit 1 the net retention of the Northwestern was only \$32,000 instead of \$50,000 as they reported?

A. It is with the application of the Lloyd's treaty.

(Deposition of Frank H. Newman.)

Q. In reporting on daily such as this amount retained no consideration is given to a catastrophe policy such as that?

A. It has to be under the wording of this contract.

Q. I am just trying to find out now what they would report as being their net retention on each, bridge A and on bridge B?

A. If what they reported in the case of the Tacoma Bridge is any indication the Northwestern apparently would have reported a retention of \$50,000 on each bridge. What they should have reported net retention as defined in my testimony an amount of \$32,000 on each bridge.

Q. \$32,000 event? A. \$32,000 even.

Q. On each bridge? A. Yes.

Q. But with the same cause destroying both bridges, that would not have been accurate, would it? A. Yes, it certainly would. [148]

Q. Even though they were called upon to pay only a \$37,000 loss on both bridges?

A. It would have been accurate under common usage and interpretation and the fact that pro-rata reinsurance always presupposes a net retention upon each risk, and admittedly there may be a disaster involving more than one risk, and, as already testified, it is generally admitted that companies carry a catastrophe cover for this purpose. What the pro-rata reinsurer must be interested in is the fact that he is following the net

(Deposition of Frank H. Newman.)

retention as mutually agreed between both contracting parties on each individual risk.

Q. It is true, of course, you can't determine whether Lloyd's policy, Exhibit 1, will be brought into play until after a loss has occurred. Isn't that true?

A. It must be assumed that one risk may always be a total loss and if the net retention is quoted in excess of the first loss retention on an excess cover, the pro-rata reinsurer, if he has a one line contract—one net line contract—would then pay more than the ceding company, which is not the purpose of any contract entered into between two contracting parties if all the facts are known and disclosed.

Mr. Cook: Please read the question.

(Whereupon, the last question was read by the reporter, as follows:

“Q. It is true, of course, you can't determine whether Lloyd's policy, Exhibit 1, will be brought into play until after a loss has occurred. Isn't that true?)

The Witness: That by itself is true, but only by itself. It must have no relation.

Q. Assume that all these facts which you have assumed are true, [149] that on the first day of this windstorm, whatever the date was, a 50% loss had been sustained to the bridge, and that the following day another storm came along and destroyed the other 50%. How would the Northwestern have had to pay out of its own pocket?

(Deposition of Frank H. Newman.)

A. Did you say twenty-four hours—one day?

Q. Yes.

A. Did you specify a windstorm or you did not specify the type of disaster?

Q. Well, it is from a different cause. I am not interested in the time but two losses from separate causes.

A. The first loss might be the windstorm loss and the following day the balance might be destroyed by collapse. It is a very hard and general question to ask or answer, but in the illustration used the collapse would have been dependent upon the windstorm.

Q. I don't want the two losses related in any way. Here one day is a loss from cause A up to 50%, and a day or two later is another 50% loss from cause B. Under those two circumstances how much would the Northwestern out of its own pocket have to pay?

A. I know you wish me to answer \$50,000 but to me the problem is more complicated than that.

Q. Is \$50,000 a correct answer or not?

A. Not necessarily, in my opinion, because I believe that the Lloyd's policy might pay.

Q. On what theory?

A. That the bridge had been weakened by the first damage, whatever the cause of the second.

Q. You are assuming that the total loss then was occasioned by one cause really? [150]

(Deposition of Frank H. Newman.)

A. It is very difficult to believe otherwise. When it is stated as 50% in the first loss with the second following the next day.

Q. I have asked you to assume for the purpose of your answer that the second loss was from an entirely different and distinct cause and had no relation whatsoever to the first one. In that event would not the Northwestern have had to pay \$50,000 under their policy?

A. I don't believe they would have to under this Lloyd's policy.

Q. That Lloyd's policy covered damage or loss from a single cause?

A. From many causes, does it not? I just can't admit the hypothesis.

Q. I am asking you to assume it as being true whether it is or not for the purpose of your answer?

A. Well, I feel I have already answered that. I believe Lloyd's policy would pay.

Q. Will you refer to the provision of Lloyd's policy where it covers only damage coming from one cause?

A. (Reading): Quote now—"applies (blank) to all hazards written by the reinsured company." That is what I base my answer upon.

Q. Suppose that the Northwestern had one hundred houses insured against fire and a separate fire destroyed each of those one hundred houses. Certainly, Lloyd's policy would not cover in such a situation as that, would it?

(Deposition of Frank H. Newman.)

A. The answer is no, but the question is not analogous in my mind to the preceding.

Q. Is there any distinction between that situation and having two separate causes at two different times destroy the Tacoma Narrows Bridge?

A. Yes.

Q. Why is there? [151]

A. Because in the first supposition it concerned only one risk whereas in the latter you assumed one hundred houses were involved at different times. They are not all one risk.

Q. Well, let me ask you this: suppose that the Tacoma Narrows Bridge was insured as these facts show and that there were ten separate occurrences doing damage to that bridge wholly unrelated one to the other and each one damaged it to the extent of \$10,000, would the Lloyd's policy come into play under that state of facts? A. No.

Q. It would not. And under that state of facts how much would the Northwestern Mutual have had to pay out of its own pocket?

A. It would have to pay \$5,000, if 10%, but this seems to me beside the point in the major question under review because it must be assumed that a bridge risk may be a total loss, as it was virtually proven in this Tacoma Bridge case.

Q. You said they would have had to pay \$5,000 under the assumption if there were ten losses or five losses of \$10,000 each so far as the Northwestern share is concerned. They would be called upon to pay a total of \$50,000, would they not?

(Deposition of Frank H. Newman.)

A. If there were ten successive losses at different periods and with spacing sufficient to render the Lloyd's contract non-operative, the Northwestern would pay \$5,000 for each 10% damage——

Q. (Interposing): Or a total of \$50,000——

A. (Continuing): ——but the reinsurer is not so much concerned with what the ceding company must pay on a partial loss because the measure of the reinsurer's liability must always be the maximum amount which the reinsurer can lose based upon the multiple of the ceding company's net retention assumed under [152] any contract.

Q. I asked that question merely to see if you would agree with me,—that although you say the true net retention is only \$32,000 there are times and circumstances under which they could be called upon to pay their full \$50,000. Isn't that right?

A. That is true but it is very definitely also true in connection with any catastrophe cover whether it has a high or a low first loss retention, and it is not the main point with which the reinsurer must be concerned.

Q. How is it possible for a company to be called upon to pay more than they retained?

A. In the case of the Northwestern's retention of \$50,000 on the Tacoma Bridge they had a maximum—they had an ultimate loss retention as expressed by Lloyd's of \$32,000 as arranged, but they had a retained liability, not a net retention, of \$50,000. There is a great difference between

(Deposition of Frank H. Newman.)

the two terms "retained liability" and "net retention."

Q. Well, do you now then draw a distinction between net retention and retained liability?

A. In connection with a Lloyd's contract you must because——

Q. (Interposing): Mr. Newman, in your answer to the first question which was asked you when you defined net retention, you said it is the amount of liability retained after the application of all reinsurance, or, in other words, the amount in dollars that the company would have to pay if there was a total loss?

A. That is correct as to net retention, but a pro-rata reinsurer——

Q. (Interposing): Retained liability or retained reinsurance is exactly the same, isn't it——

A. But under the application of an excess cover a writing company may retain, or, in other words, write against the cover or, [153] as is often stated, have a retained liability in excess of their first loss retention and that is inherent in the cover which is a capacity limit beyond the first loss retention.

Q. The ceding company can't have liability to pay money for anything in excess of the amount of insurance it retained, can it?

The Witness: Not in one loss, but there could be a succession of partial losses which would exceed in the aggregate in some given period, say, a year, the amount retained.

EDWIN STEWART,

a witness herein, having been first duly sworn by the Notary, testified as follows:

Direct Examination

By Mr. Muller:

Q. Will you kindly state your full name and age? A. Edwin Stewart; age 45.

Q. And also state your residence address and business address?

A. Rumson Road, Rumson, New Jersey; business address, 99 John Street, New York City.

Q. In what business or occupation are you engaged? A. Reinsurance underwriting.

Q. With what firm or firms are you associated and in what capacity?

A. President of the Excess Management Corporation.

Q. At 99 John Street? A. Yes.

Q. Will you kindly state the nature, character and extent of your experience in the insurance business in general, and in the field of reinsurance in particular?

A. From 1920 to 1934, I was a reinsurance broker; and from 1934 to date, a reinsurance underwriter.

Q. Have you at my request examined a photostatic copy of a treaty [154] between Northwestern Mutual Fire Association and the Union Mutual Fire Insurance Company, dated January 1, 1940, and set forth in full in the amended complaint filed in this case? A. Yes.

(Deposition of Edwin Stewart.)

Q. Have you also examined a photostatic copy of Lloyd's policy No. D-30477, issued to the Northwestern Mutual Fire Association by Underwriting Members of Lloyd's? A. Yes.

Q. As a basis of my questions which follow I refer to both of these contracts and request that you assume the following facts:

Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000. Subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P.M.L." was 50%. Northwestern specifically reinsured all but \$50,000 of said \$350,000 of insurance. Also assume that at the time Northwestern made said cession to Union the Northwestern was reinsured under an existing excess of loss reinsurance policy, No. D-30477, and assume that Northwestern in making said cession of \$50,000 to Union and in computing and advis-

(Deposition of Edwin Stewart.)

ing Union in the Certificate of Reinsurance No. 10852 of Northwestern's [155] net retention considered only specific reinsurance and gave no consideration to the excess of loss policy No. D-30477.

Now, will you kindly state what is the meaning in the insurance business of the term amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company, as used in the reinsurance treaty of January 1, 1940, between Union and Northwestern in Article VIII, having in mind the customs and usages of the insurance business?

A. You have asked me the usage and intent?

Q. What is the meaning in view of the customs and usages in the insurance world, of the term net retention as set forth in Article VIII of the Union-Northwestern treaty?

A. The words "net retention" mean that amount of liability assumed by the company and not shared or protected in any way by any other carrier.

Q. Will you also please state and explain, based on the assumed facts, what consideration should or would be given by the ceding company to an excess of loss policy, such as Exhibit 1, Policy No. D-30477, in computing and advising its treaty reinsurer under a treaty provision as set forth in Article VIII of the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company?

(Deposition of Edwin Stewart.)

A. The usual custom is that it is noted in the reinsurance treaty that the ceding company carries an excess cover to protect that amount of liability it retains and it is further noted that that cover shall be disregarded in the company setting up its net retention.

Q. With respect to the net retention provision of Article VIII of [156] the reinsurance treaty between Northwestern and Union, state whether or not that particular form of net retention provision or the substance of it is a uniform provision customarily included in all reinsurance treaties or whether or not under the customs and usages of the insurance business such net retention provisions vary in form, and, if so, how and in what respect and to what extent they vary?

A. I would say that this is a customary provision if there are no agreements between the two companies as to what shall constitute the net retention. Many times when a parent company will include its subsidiary companies in its net retention, that might be called the office line, but that should be noted in a treaty; otherwise without any special notations this states that the company will retain net without any coverage whatever.

Q. Is the custom and usage in the insurance business with respect to the computation and statement of net retention by a reinsured company to its treaty reinsurer dependent upon the particular wording of the net retention provision in the reinsurance treaty?

(Deposition of Edwin Stewart.)

A. Can that question be put in other language?

Q. In view of the assumed facts and taking into consideration the provisions of Northwestern's excess of loss policy, that is Exhibit 1, can you compute the highest possible loss which Northwestern could sustain at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge? A. \$32,000.

Q. What is the meaning in the insurance business, in view of the customs and usages of that business, of the term "P.M.L." as used in the Certificate of Reinsurance No. 10852 transmitted by Northwestern to Union, and for what purpose is the term "P.M.L." [157] customarily used by a reinsured company in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?

A. The initials "P.M.L." mean probable maximum loss. In this case it says 50% P.M.L., meaning—which means that the underwriter of the Northwestern considered this Tacoma Bridge policy in which they ceded \$50,000 a 50% probable loss—probable maximum loss—and applying that to the cession he is telling the Union underwriter that the probable maximum loss under this cession would be \$25,000. The reason that this is noted on a cession is to give the reinsurer an idea of the risk so that if he desires to lay some of the cession off he can do so.

Q. To what extent, if any, is the term "P.M.L." used to indicate the number of risks involved?

A. None whatsoever.

(Deposition of Edwin Stewart.)

Q. Under the customs and usages of the insurance business in what manner, if any, do the reinsuring companies indicate the number of risks involved in making cessions of reinsurance?

A. They show it on the cession report—each risk. If there is more than one risk under the one cession they will list the number of risks.

Q. Will you describe the various types and kinds of reinsurance, briefly?

A. Well, there is what we call facultative or street reinsurance, where a company will reduce its liability by giving a portion—by placing a portion of a single risk with another company by way of reinsurance.

Q. Is that also called specific and pro-rata reinsurance?

A. Specific, yes. It is on a pro-rata basis; it is not excess of loss. Then there is surplus treaty reinsurance, which is usually obligatory on the part of the accepting company, [158] and obligatory as to when a cession shall be ceded on the part of the ceding company, and that is on a participating or pro-rata basis. Then there is excess of loss coverage, which can be excess of line or excess of a given amount in one loss or a series of losses arising out of one event. And then there are so-called conflagration or catastrophe covers which are on an excess basis.

Q. Excess of loss basis?

A. Yes, excess of loss basis, over a very large retention usually because the company that buys it

(Deposition of Edwin Stewart.)

is only seeking protection in the event of a conflagration or a hurricane, such as the 1938 hurricane,—a major catastrophe.

Q. Now, I refer to Policy D-30477 and ask you what kind or type of reinsurance you would consider that?

A. I would call this an excess of loss cover.
[159]

Mr. Muller: That is all.

Cross Examination

By Mr. Cook:

Q. Mr. Stewart, what is the nature of the business of the Excess Management Corporation?

A. They are underwriting managers of a group of thirteen insurance companies that participate in the assumption of liability on a participating basis and an excess of loss basis for direct writing insurance companies.

Q. In other words, it is not an insurance company itself but merely is the underwriting manager of these other thirteen companies? A. Yes.

Q. In your duties connected with the company do you have any direct connection with the cessions of reinsurance from reinsuring companies?

A. Yes. All treaties are made in our office, signed by us in behalf of the companies, and all cessions under the treaties are made to our office and bordereaured in our office.

Q. So you negotiate the treaties in the first instance and then the cessions or daily reports, what-

(Deposition of Edwin Stewart.)

ever you call them, actually come through your office on each session?

A. Yes, and are underwritten by the underwriters in our office.

Q. You defined net retention as being the amount of liability assumed by the company, by the ceding company, and not protected by any other carrier? A. Yes. [160]

Q. Isn't it true, Mr. Stewart, that on the assumed state of facts, here, and considering the existence of Lloyd's policy that we have referred to, you cannot compute the amount of liability which the Northwestern would have on their \$50,000 retained insurance until after a loss has occurred?

A. You say you cannot compute the liability?

Q. Yes. Until after your loss has taken place?

A. I think you are wrong because this policy, Lloyd's policy sets forth that—may I read the policy again.

Q. Certainly.

A. The intent of this Lloyd's policy is to protect the Northwestern for 90% of the liability in excess of \$30,000, and in the usage and custom of the reinsurance industry the \$30,000 mentioned in this Lloyd's policy plus the 10% interest in the loss in excess of \$30,000, is considered the net retention of the company.

Q. That, of course, applies only when you are speaking of one loss?

A. No. Or a series of losses arising out of one event.

(Deposition of Edwin Stewart.)

Q. Yes, out of one event. However, with a series of losses from different events the liability of the Northwestern would be in excess of your stated figure of \$32,000?

A. But you cannot have a series of losses from different events.

Q. Why not?

A. The meaning of one loss or series of losses means that one risk may be involved or several risks may be involved in the same event, such as, a tornado or a sweeping fire.

Q. I think I understand that. I probably, unfortunately, used the wrong expression when I said a series of losses. What I should say is separate losses from separate causes, then the liability of the Northwestern could be the full \$50,000 retained?

[161]

A. No. In each case it would be \$30,000 plus their 10% interest in each event you referred to.

Q. The amount of money which they would pay out on those losses would be \$50,000?

A. Before collecting from the Lloyd's policy do you mean? Do you mean before collecting from the Lloyd's policy?

Q. If each loss was under \$30,000 the Lloyd's policy would never come into play, would it?

A. If their loss or losses in each event was less than \$30,000.

Q. That is what I mean to say.

A. It would not come into play.

Q. And assuming that state of facts the amount

(Deposition of Edwin Stewart.)

of money which they would have to pay out could be their full \$50,000 retained?

Mr. Muller: In any one loss?

Mr. Cook: No, I am just speaking of this group of losses.

A. Are you referring to a group of losses happening at different times to one risk?

Q. That is right. A. That is correct.

Q. So when we speak of the amount of liability, referring now to your definition, assumed by the company it could conceivably in this case be up to the full \$50,000 under this policy or under this \$50,000 retention?

A. Do you mean under the example which you have just given?

Q. Yes.

A. Under the example there could be separate losses whereby Northwestern could lose \$50,000 net.

Q. Now, you stated, as I recall it, that the customary way of doing business between a ceding company and its reinsurer was to note in the treaty the existence of excess of loss coverage, such as this Lloyd's policy, and then to disregard the existence [162] of it in reporting the net retention. Did I understand you correctly?

A. Yes. The custom as to set forth in the treaty a definition of net retention—the words “net retention” referred to in the treaty—and in that definition it is acknowledged by the accepting company that for the purposes of the treaty the net retention shall be that portion of the risk retained

(Deposition of Edwin Stewart.)

net by the ceding company un-reinsured in any way except by an excess of loss cover and that for the purpose of ceding the net retention under the treaty the excess of loss coverage shall be disregarded.

Q. In other words, going back to these two treaties here, I assume that had it been stated in the treaty between Northwestern and Union that the Northwestern carried this Lloyd's policy, then the method here of reporting the net retention would be the accepted and correct way of doing it?

A. Do you mean this cession advice?

Q. Yes.

A. That is right, and I think it would—it might have affected materially the Union's acceptance of one line. As I recall, it does in this treaty—an identical line with the Northwestern—and probably they would not have accepted this specific line which was over and above the amount that they could cede under the treaty, but this is only an assumption; I don't know either company.

Q. It really comes down simply to this, doesn't it, Mr. Stewart, that it depends entirely upon what knowledge the Union may have had of the existence of this policy, of Lloyd's, Exhibit 1?

A. Not technically. Technically, because it was not in the treaty—acknowledged in the treaty that this excess of loss policy was in existence, I think that the net retention of the [163] Northwestern was not as stated in the cession advice.

Q. But from a practical standpoint, and so far as any affect it might have on the Union's accept-

(Deposition of Edwin Stewart.)

ing that amount, if they knew of the existence of that Lloyd's policy, Exhibit 1, that was all they were entitled to know?

A. No. I think it might have influenced their acceptance.

Q. Not if they knew it and still accepted the amount ceded? A. Not if they knew it.

Q. If they knew of the existence of Exhibit 1 and still accepted the amount ceded, the form of reporting of course was very unimportant?

A. If they knew it and still accepted the \$50,000, yes.

Q. Of course it is a universal practice for all insurance companies to carry some form of excess of loss coverage? A. I wish it were.

Q. That is not the fact? A. No.

Q. How general is the practice of carrying some form of excess of loss coverage?

A. Well, I could answer—would you like to have me answer that percentagewise as to all companies?

Q. If you can. I don't expect you to be exact. I am interested in knowing in a general way.

A. I would assume that over 50 per cent of the companies carry excess of loss similar to this Lloyd's policy.

Q. You injected a rather new element when you confined it to excess of loss similar to Exhibit 1. My thought was and the question was that they carried some form of excess of loss coverage?

A. I still think not over 50 per cent of the insurance companies.

(Deposition of Edwin Stewart.)

Mr. Cook: I think that is all. [164]

Redirect Examination

By Mr. Muller:

Q. Based on an answer you gave when considering separate and distinct losses, wherein the over-all payments to be made by Northwestern I understood you to say might amount to 50 per cent, did you mean net any one loss?

A. I don't think I said 50 per cent. I think I said might amount to \$50,000.

Q. \$50,000 net? A. Yes.

Q. You didn't mean net any one loss?

A. The total.

Q. The total? A. Yes.

Q. In other words, you did not mean to convey the idea that Northwestern might sustain a net loss of \$50,000 in any one of those individual and distinct losses without application of the Lloyd's treaty? A. No.

Q. Now, may I ask you in reference to the usage and customs of mentioning excess of loss treaties when referring to net retention as permission being granted to carry excess of loss without affecting the net retention, and I show you two clauses and ask you whether or not they are customary clauses covering the statement as you have already testified to? You might read them.

A. (Witness reading) "The net retained line of the reassured on any one risk shall not be considered as being reduced by any amounts recover-

(Deposition of Edwin Stewart.)

able from excess of loss reinsurance.” That is one clause. The other reads: “The net retained line of the reassured on any one risk shall be considered to be an amount [165] equal to the ultimate net loss (after deducting amounts due from excess of loss and other reinsurances) that the reassured could sustain if the loss on such risk were total and no other risk was involved in the same occurrence.”

Mr. Muller: Now please read the question.

(Whereupon the last question was read by the reporter as follows:

“Q. Now, may I ask you in reference to the usage and customs of mentioning excess of loss treaties when referring to net retention as permission being granted to carry excess of loss without affecting the net retention, and I show you two clauses and ask you whether or not they are customary clauses covering the statement as you have already testified to?”)

A. As to the first clause I read this is a customary clause. As to the second clause I read I do not think it is as customary but it sets forth clearly what the net retention shall be. Does that answer your question?

Q. And granted permission in respect to an excess of loss cover?

A. The second clause sets the net retention after deducting the amounts due from excess of loss.

Mr. Muller: I have nothing further.

Mr. Cook: I have nothing further.

WALTER J. THOMPSON,

a witness herein, having been first duly sworn by the Notary, testified as follows:

Direct Examination

By Mr. Muller:

Q. Will you kindly state your full name and age? A. Walter J. Thompson; age 53.

Q. Will you state your residence address and business address? [166]

A. Residence, 1301 Findlay Avenue, New York City; business, 41 Wall Street.

Q. In what business are you engaged?

A. Insurance business.

Q. With what firm or company are you associated and in what capacity?

A. Atlantic Mutual Insurance Company, as Secretary; and Centennial Insurance Company, as Secretary.

Q. Will you please state the nature, character and extent of your experience in the insurance business, and in the field of reinsurance, in particular?

A. I have been employed by the Atlantic Mutual Insurance Company thirty-six years. Part of that time has been in connection with loss and adjustments; first, underwriting loss adjustment and then in charge of reinsurance in the capacity of Secretary.

Q. How many years have you been in charge of the reinsurance feature of the business?

A. I would say about ten or eleven years in reinsurance placing.

(Deposition of Walter J. Thompson.)

Q. Have you at my request examined a copy of a treaty between Northwestern Mutual Fire Association and the Union Mutual Fire Insurance Company, dated January 1, 1940, and which is set forth in full in the amended complaint in this case?

A. Yes.

Q. And have you also examined a photostatic copy of Lloyd's Policy D-30477 between Northwestern Mutual Fire Association and Underwriting Members of Lloyd's?

A. Yes.

Q. As a basis of the questions to follow I refer to both of those contracts and ask that you assume the following facts:

Northwestern in the latter part of June, 1940, executed [167] and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000. Subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P.M.L." was 50%. Northwestern specifically reinsured all

(Deposition of Walter J. Thompson.)

but \$50,000 of said \$350,000 of insurance. Also assume that at the time Northwestern made said cession to Union the Northwestern was reinsured under an existing excess of loss reinsurance policy No. D-30477, and also assume that Northwestern in making said cession of \$50,000 to Union and in computing and advising Union, in said Certificate of Reinsurance No. 10852, of Northwestern's net retention considered only specific reinsurance and gave no consideration to the above mentioned excess of loss reinsurance policy.

Now, will you kindly state what is the meaning in the insurance business of the term retained net without reinsurance by the reinsured company at its own cost and liability, such as is set forth in Article VIII of the treaty between Union and Northwestern, having in mind the custom and usage of the insurance business?

A. It would mean that the reinsurer under this treaty would not have a liability for loss greater than the ceding company is willing to bear on the same risk after taking into consideration all reinsurance including excess of loss reinsurance which [168] would apply on one risk. Now, I just like to qualify that by saying that if the ceding company's loss on any one risk or any particular risk were reduced by the pro-rata application over several risks or any number of risks on a recovery made by them under a catastrophe cover, such reduction would not constitute a violation of their retention. It would be assumed that the excess point in any ca-

(Deposition of Walter J. Thompson.)

tastrophe—in any such catastrophe cover would be as great as or greater than the retention of the company on that particular risk or on any one risk.

Q. Based on the assumed facts will you also kindly state what consideration under the customs and usages of the insurance business should or would be given by the ceding company to an excess of loss policy, such as Exhibit 1, Policy D-30477, in computing and advising its treaty reinsurer wherein the treaty provision is such as set forth in Article VIII as to the amount of retained net without reinsurance by the reinsured company?

A. If there were no saving clause in the treaty, that is, to the effect that excess of loss reinsurance would not be considered as reducing and be considered as affecting the company's retention within the terms of the treaty, then in advising their reinsurer they should either state retention so much subject to excess of loss reinsurance.

Q. With respect to the net retention provision of Article VIII of the treaty between Union and Northwestern, state whether or not that particular form of net retention provision, or the substance of it, is a uniform provision customarily included in all reinsurance treaties?

A. The wording would vary somewhat but the substance of the provision is customary in all reinsurance treaties.

Q. Will you kindly state and explain to what

(Deposition of Walter J. Thompson.)

extent, if any, is [169] the custom or usage in the insurance business, if any, with respect to computation and statement of net retention by the reinsured company dependent upon the particular wording of the net retention provision in the reinsurance treaty?

A. They would indicate to their reinsurers their net retention in amount or in percentage.

Q. In view of the assumed facts and taking into consideration the provisions of Northwestern's excess of loss policy, can you compute the highest possible loss which Northwestern could sustain at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge?

A. Well, they had a retention of \$50,000. Then there was 90% of the excess of \$30,000 so they would have \$30,000 of the loss and then \$2,000—maximum loss.

Q. What is the meaning in the insurance business, in view of the customs and usages of the business, of the term "P.M.L.", as used in the reinsurance certificate No. 10852 transmitted by Northwestern to Union, a copy of which I now show you?

A. It has no force. It merely indicates what in the opinion of the Northwestern is the probable maximum loss to be sustained on this cession.

Q. To what extent, if any, is the term "P.M.L." used to indicate the number of risks involved by the reinsured company in making cessions of reinsurance?

(Deposition of Walter J. Thompson.)

A. Usually each cession is supposed to be one risk, but if it does happen that a cession, for instance, under a reporting policy, would have a number of risks they would indicate on the bordereau more than one risk or various risks.

Q. Will you kindly state briefly the types or kinds of reinsurance? A. Do you mean all?

Q. The basic ones or those which come to your mind? [170]

A. There is facultative reinsurance; excess of line reinsurance, as used in the marine business; surplus reinsurance, as used in the fire business and inland marine business; excess of loss ratio reinsurance; excess of loss reinsurance; catastrophe reinsurance.

Q. Is there any basic distinction between the various reinsurances which you have specified?

A. The basic distinction is excess of line, facultative, excess of loss, and surplus, would be participating reinsurance; that is, they would participate as soon as the excess or surplus is determined. It becomes participating reinsurance.

Q. With the?

A. With the original company. On excess of loss reinsurance or excess of loss ratio reinsurance it becomes applicable as soon as the loss excess point is exceeded by the original company.

Q. Will you kindly refer to the excess of loss Lloyd's policy D-30477, and state what kind or type of reinsurance that might be considered under the two main classifications?

(Deposition of Walter J. Thompson.)

A. Excess of loss and also catastrophe reinsurance. Excess of loss in a single risk, and catastrophe reinsurance. [171]

Mr. Muller: That is all.

Cross Examination

By Mr. Cook:

Q. You made one statement I don't know if I understood or not. Where you say in reporting net retention to the reinsuring company you would not have to take into consideration any possible recoveries which would be made under a catastrophe reinsurance contract. Is that correct?

A. I think my statement was that if it can be considered that the ceding company's loss is reduced by the application—by pro-rata application over a number of risks, recovery received under a catastrophe cover—in other words, it would be assumed that the catastrophe covered when a number of risks were involved—then I don't think by reason of the fact that the loss on one risk which was involved in a catastrophe, that a number of other risks had been reduced, that such reduction would be considered a violation of the warranty.

Q. In other words, if this windstorm had, say, blown down a half dozen dwellings as well as the bridge upon which the Northwestern carried policies, and by reason of that fact made a recovery under their catastrophe policy, they still, as I understand you, would have made no mention of the

(Deposition of Walter J. Thompson.)

existence of the catastrophe cover in reporting their net retention on the bridge?

A. No, I think they would be—they would have to by reason of the fact that the excess point on the excess of loss reinsur- [172] ance was lower than their indicated retention on any one risk.

Q. Well, what I was leading up to: the reason, as I understand it, that you think the existence of this policy, Exhibit 1, should have been reported is because the excess point is below the \$50,000 retained loss. Is that correct?

A. That is right.

Q. And of course it is not customary to report the existence of catastrophe contracts?

A. No.

Q. And in catastrophe contracts you say the excess point is usually higher than this particular one is?

A. Higher than the top retention of the company on one risk.

Q. This policy, Exhibit 1, of Lloyd's is a catastrophe contract with a low excess point, isn't it?

A. It is an excess of loss contract on one risk and a catastrophe cover also.

Q. Then the excess point is lower than customary in policies of that kind, I take it?

A. As a catastrophe cover.

Q. The carrying of contracts similar in nature to that is very general in the insurance business, isn't it?

A. Yes.

(Deposition of Walter J. Thompson.)

Q. Would you say that it was practically a universal custom for companies to carry some form of excess cover? A. I would.

Q. And that fact is well known in the insurance world—that other companies do carry that kind of insurance? A. Yes.

Q. Your opinion that the existence of this policy, Exhibit 1, should have been reported to the Union is based on the assumption, is it not, that the Union did not know of the existence [173] of that policy?

A. No. I will say that the Union would assume that any excess of loss—any catastrophe cover which the Northwestern had would attach at least at the point—at least equal to or higher than the top retention indicated by the Northwestern.

Q. I possibly did not make the question clear. I am not asking you what the Union might be justified in assuming. I said that your answer was based on the assumption that they did not have actual knowledge of the existence of this policy. In other words, if they actually knew of the existence of this policy they would not be justified in assuming anything? A. That is right.

Q. The clause in the treaty between the Union and the Northwestern makes no mention of the existence of this Lloyd's policy, does it?

A. No.

Mr. Cook: That is all.

Mr. Muller: That is all.

JOHN ALDEN TOWERS

called as a witness by the Defendant, first duly sworn, testified as follows:

Direct Examination

By Mr. Dumett:

Q. Will you please state your name for the record? A. John Alden Towers.

Q. Where do you reside, Mr. Towers?

A. Berwyn, Pennsylvania.

Q. In what business are you engaged?

A. Reinsurance.

Q. With what firm are you connected? [174]

A. Towers, Perrin, Forster & Crosby, Incorporated. And I am also president of John D. Pryce & Company, Incorporated.

Q. The place of business of those firms is what?

A. Number 12 South 12th Street, Philadelphia.

Q. What is the nature of the business in which those firms are engaged?

A. We analyze the companies needs reinsurance wise, and design for them covers, which we feel are adapted to their needs, and which are approved by them, naturally.

Q. The nature of that business is entirely reinsurance? A. Entirely reinsurance.

Q. Will you state, please, Mr. Towers, the nature and extent of your experience in the insurance business and in the reinsurance business?

A. Well, I started at Kansas City, Missouri, where I was born, in 1918. We then had an insurance agency and an insurance brokerage business.

(Testimony of John Alden Towers.)

We also operated an insurance carrier, writing fire insurance—automobile dealers. We carried that on until 1923, and having started in 1919 an office in Philadelphia, we sold out the business in Kansas City and devoted our entire time to the reinsurance business in Philadelphia. During that time we were interested in finance and to an extent in the management of an agency and a brokerage business in Philadelphia, one of the oldest, the Henry W. Brown & Company, and Brown & Crosby Company. We also operated a reciprocal exchange of fire insurance for theatres, which was sold out also. Since 1933 we have devoted our entire time to reinsurance, but my personal time has been devoted to reinsurance since about 1920, in the main. I have also underwritten reinsurance for some American markets, and at the present time I am doing so for one market.

A. When you say the American market, what do you mean by that? [175]

A. Passing upon and approving the terms; in other words, accepting the reinsurance for the company.

Q. You are acting as agent and reinsurance broker and have operated a company, and you have had the experience of underwriting reinsurance contracts?

A. Yes, sir.

Q. All of those? A. That is right.

Q. In this case we have had reference from time to time by the various witnesses, as I understand it,

(Testimony of John Alden Towers.)

to the main types of reinsurance. We have the term pro rata or contributing reinsurance and also excess of loss reinsurance and catastrophe covers. In view of your experience will you state what those terms mean in the insurance business?

A. The first form of reinsurance was contributing reinsurance—pro rata contributing reinsurance. At first I think it was all done specifically. That is, it was placed individually on each risk. As time went on the business became large, and that became very burdensome—the details. And later treaties were evolved, similar to this Northwestern treaty. About 1905 one of my previous partners wrote the first excess of loss contract in this country, to my knowledge, according to Lloyd's. Then in 1907, immediately following the earthquake he wrote the first catastrophe cover.

Mr. Cook: I do not believe this is responsive, and it is obviously hearsay.

The Court: Just answer the question, and if you wish it to be read we will do that.

A. It is not hearsay, because I have seen the policy.

The Court: That is another matter. Read the question.

(Last question read by reporter.)

Directly state the meaning [176] of those terms.

A. The pro rata reinsurance contributes on each and every loss on a pro rata contributing basis. The excess of loss reinsurance reinsures the company against a loss greater than a certain named net loss

(Testimony of John Alden Towers.)

retention. A catastrophe cover is an excess of loss cover, except that the attaching point—that is, the net retention—is usually about twice the maximum line that a company writes on an individual risk, and in my opinion a catastrophe cover must have—to be a catastrophe cover—a retention greater than the amount a company writes on any single risk. That is the difference between catastrophe and excess of loss, to my mind.

Q. What is the amount of loss retention customarily named, under a catastrophe cover? Perhaps you have covered it; I don't know.

A. It depends entirely on the amount that a company accepts on individual risks. In other words, the underwriting practices of the company determine what would be a proper retention for a catastrophe cover. Now, some managements are naturally more conservative than others, and some name very high retentions. Others have relatively lower retentions. One that I know of has as high as a three million first lost retention. Others have as low as fifteen or twenty-five thousand dollars, but those having those low retentions are companies that write very small lines on individual risks.

Normally two or more risks would be involved in one occurrence for a catastrophe policy to attach. In fact until the early 1920's Lloyd's required a two-block cover.

Q. Meaning what?

A. Before the catastrophe cover applied risks in at least two blocks must be involved.

(Testimony of John Alden Towers.)

Q. I think perhaps you have covered this at the time counsel ob- [177] jected that it was not responsive, but I will ask it again. Which type of reinsurance you have referred to developed last?

A. The excess of loss.

Q. That was about when?

A. It became more or less in general use in the early twenties. The first one I know of was in 1916. The first catastrophe known to me was in 1905.

Q. Some of the witnesses in this case seem to disagree, or that is my impression, as to how extensive the practice is for insurance companies to carry excess of loss reinsurance and catastrophe covers. What have you to say from your experience as to the extent of the practice in the United States of companies carrying excess of loss and catastrophe covers?

A. I will try to answer that then, Your Honor. In our business we handle mutual, reciprocal and stock companies, and the custom as between those three classes varies. My reply would be an over-all average, whereas the reply of a witness handling only stock business would be a different figure, and one handling only mutual business would be a still different figure.

Q. What would be the over-all figure?

A. It naturally is a very rough estimate. I would say there would probably be twice as much pro rata reinsurance placed had not the excess of loss plan been adopted. In other words, the excess

(Testimony of John Alden Towers.)

of loss plan has supplanted, in my opinion, over-all roughly fifty per cent of the reinsurance requirements of the various companies.

Q. In the various questions which follow, Mr. Towers, for the sake of brevity I will refer to the plaintiff, the Northwestern Mutual Fire Association, as the Northwestern, and the the defendant, Union Mutual Fire Insurance Company, as the Union. Have you, at my request, examined a reinsurance treaty which is set forth in [178] the plaintiff's amended complaint in this action, and which is between the Northwestern and the Union, dated January 1, 1940? A. I have.

Q. By the way, does the reinsurance covered in that treaty come within the definition of pro rata or pro rata contributing reinsurance?

A. Pro rata contributing.

Q. And have you also, at my request, examined plaintiff's exhibit "1", or a photostatic copy of it, the excess policy of the Northwestern with Lloyds, D30477? And I now hand you the original?

A. I have.

Q. Plaintiff's exhibit "1" is what type or kind of reinsurance?

A. I would say it is a combination excess of loss and catastrophe cover.

Q. Why is that?

A. It is excess of loss because it is apparent that the retention is less than the amount retained by the Northwestern on individual risks. It is catastrophe

(Testimony of John Alden Towers.)

because it applies to an aggregate loss in any one occurrence regardless of the number of risks involved—one or more risk.

Q. Assuming that the Northwestern in June, 1940, notified the Union that it was ceding, under the treaty, to Union \$50,000.00 of reinsurance on the Tacoma Narrows Bridge, and that it was retaining an identical \$50,000.00 on the Tacoma Narrows Bridge, as of that date, would the exhibit "1", which you have before you, have any application, in your opinion, and, if so, what type of reinsurance is it?

A. Yes, sir. It is excess of loss reinsurance.

Q. And why is that?

A. Because the retention named under this excess contract is [179] \$30,000.00, and the Northwestern stated they were retaining \$50,000.00. The first loss retention is thirty, and there is a participation in excess loss—that is, losses above thirty thousand and ten percent by the Northwestern, making a total of \$32,000.00.

Q. Is the \$30,000.00 figure, as mentioned in exhibit "1", sometimes called the attachment point of the excess cover—or what is the correct term?

A. The ultimate net loss retention is usually the term.

Q. Is that a customary net loss retention—is that customary at \$30,000.00 in that regard?

A. I have answered before that the retentions vary according to the underwriting practices of the company. It would be, in my opinion, too low a

(Testimony of John Alden Towers.)

retention for it to be called a catastrophe cover—properly called a catastrophe cover—because it is less than the amount they write on one risk. It is a high net loss retention, as general excess contracts go. Considering as well as I know the underwriting practices of the Northwestern. It is an in-between and combination of the two, excess of loss and catastrophe coverage.

Q. You just used the term “general excess of loss.” What does that mean?

A. General excess of loss is used to apply to contracts where all risks written by a company are covered. An excess of loss contract applying to an individual risk is merely an excess of loss contract, but one which applies to every risk the company writes, with certain exclusions, is commonly called a general excess of loss contract.

Q. Does this have both of those features, exhibit “1”?

A. This does not have the individual excess of loss feature as such, but it applies to individual risks, one or more risks. [180]

Q. I will ask you to assume certain facts, if you will, and I will ask you a few questions based on it. Please assume the following facts: that at all times mentioned in my questions this reinsurance treaty of January 1, 1940, between Union and Northwestern was in effect; that this treaty provides, among other things that—I will skip that—that Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Au-

(Testimony of John Alden Towers.)

thority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000.00; that subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, defendant's exhibit "A" in this case, notifying Union that it had ceded \$50,000.00 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining identical \$50,000.00 and that the PML was 50%; and furthermore assuming Northwestern specifically reinsured all but \$50,000.00 of said \$350,000.00 of insurance; and further assuming that at the time Northwestern made said cession to Union the Northwestern was reinsured under an existing excess of loss reinsurance policy, No. D30477, and assume further that Northwestern in making said cession of \$50,000.00 to Union, and in computing and advising Union in the Certificate of Reinsurance No. 10852 of Northwestern's net retention, under its treaty, considered only specific reinsurance and gave no consideration to the excess of loss policy No. D30477; now assuming those facts, I wish to call your attention to Article 8 of the reinsurance treaty between Union and Northwestern, dated [181] January 1, 1940. You can turn to the copy of that, and I wish to call

(Testimony of John Alden Towers.)

attention to this term in Article 8: "The amount of cession hereunder shall not exceed the amount retained net without reinsurance by the reinsured company at its own risk and liability upon the same property reinsured by the said reinsured company with the reinsuring company". I would like to ask you what is the meaning in the insurance business, in accordance with the customs and usages of that business, of that term I have just referred to?

A. I could not improve on the wording. I could not make it more clear. In other words, I would say that it is the amount which the ceding company could lose, the maximum amount it could lose, in the event of a total loss on an individual risk, if no other risk were involved, which is a definition we have employed for ten or fifteen years in connection with net retained lines. But this wording means to me what it says. It goes further than most treaties, but it means the same thing. I mean its intent is customary. It goes further by defining what retained net means.

Q. What does the term "without reinsurance" mean in the reinsurance world?

A. That means what it says. It means the company will lose that amount out of its own surplus, and no other company will pay any part of that loss.

Q. Is that clause or definition, in your experience, a standard form customarily found in reinsurance treaties?

A. The wording of pro rata treaties comes to the same meaning. The wording somewhat varies. As I said before, this goes further than most word-

(Testimony of John Alden Towers.)

ings, in that it defines what amount retained net means, but the words, "retained net" would mean the same thing as that definition in usual custom.

[182]

Q. Referring again to that term "The amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property", is the particular wording of that provision found in just that way in all treaties, in your experience, or do the net retention clauses in treaties vary, and, if so, how?

A. I just said they did vary. I have here a copy of the Uniform Reinsurance Agreement approved by the Federation of Mutual Fire Insurance Companies. I could not say this is the last one. It is the last one I have seen, and it has wording to the same effect, but it simply says——

Mr. Cook: This is not responsive to the question.

The Court: The objection is sustained.

Q. I will ask you another question. I think, if I may point out in the presence of the witness, I asked how they varied, and, if so, how. I will ask if you will refer to a uniform provision—of what association is that?

A. The Federation of Mutual Fire Insurance Companies. That is the federation of mutual companies—an association or organization that many of them belong to.

Q. And what is the wording of that?

A. "The company shall retain"—I use the word

(Testimony of John Alden Towers.)

“company” instead of “blank”—“The company shall retain in or on the same risk an amount at least equal to blank percent of the amount ceded to the”—in this case it would be “Union.”

I think that is the customary wording, but I don't think that means anything different than this, except this goes on and defines what this means.

Q. Is it normal for a company ceding reinsurance and stating its net retention to its reinsurer, to advise its reinsurer of the existence of excess of loss reinsurance which might affect its [183] loss thereafter?

A. It is as respects excess of loss, but not as respects catastrophe. Out of an abundance of precaution we advise our clients——

Mr. Cook: That is not material what he advises his clients. I don't like to object, but——

The Court: The objection is sustained.

Q. You say it is customary with respect to excess of loss? A. Yes, sir.

Q. How is that done?

A. It is done in the printed blanks on specific reinsurance, or in cables or letter correspondence. I am not speaking of treaties now. Companies usually have printed forms, either prepared by their brokers or prepared by their own people, upon which this information is disclosed. As regards treaties it is usually done by specific mention in the treaty, or by exchange of letters.

Q. Those various methods are used?

(Testimony of John Alden Towers.)

A. Yes, sir.

Q. Which is the more common?

A. With the stock companies I would say that usually the excess of loss is ignored, keeping in mind most stock companies are on a loss cost plan or excess loss of reinsurance. With mutuals I would say probably half of them have by prearrangement arranged to ignore excess of loss covers. The other half agree to report absolute net after deducting excess of loss reinsurance. It is all a question of agreement.

Q. And when you refer to agreement what do you mean? Do you mean in the treaty itself ordinarily?

A. Agreement between the two contracting parties expressed in a letter or in the treaty itself—exchange of letters.

Q. In view of your experience and under the custom and usage of [184] the insurance business, would you point to any customary example of a treaty, for instance, containing a specific reference to excess of loss?

A. I have a copy here of a report on one of our clients, which is a blank we furnish and is used by about half of our clients, for the purpose, and it says "Net retention on this risk with no"—the "no" is underscored—"deduction for amounts recovered by general excess of loss reinsurance." That was prepared in 1933.

Q. Is that a treaty provision?

(Testimony of John Alden Towers.)

A. This is an application for specific pro rata reinsurance on an individual risk.

Q. Have you another example?

A. I would say half of our clients use this form on printed blanks, and others do it by letter or cable.

Q. Can you give us an example of a provision customarily used in the insurance business by a treaty that make a specific reference to excess of loss?

A. I don't know of a single treaty we have that does not, and about once a year we write to every client to remind them of the importance——

Mr. Cook: I object as not responsive.

Q. I will ask you another question. Can you give us an example of a treaty provision which expressly refers to excess of loss?

A. Here is one clause taken from one contract: "It is understood and agreed that effective blank 1937 the blank Fire Insurance Company shall have the right to carry excess of loss reinsurance in respect to their own net retention, and that:

1. As regards pro rata reinsurance ceded by the blank Fire Insurance Company, prior to the blank day of blank, 1937, the net retained line of the blank Fire Insurance Company, on [185] any one risk, shall not be considered as being reduced by any amount recoverable from excess of loss reinsurance;

2. As regards pro rata reinsurance ceded by the blank Fire Insurance Company with effective

(Testimony of John Alden Towers.)

date on and after the blank day of blank, 1937, the net retained line of the blank Fire Insurance Company on any one risk shall be considered to be an amount equal to the ultimate net loss (after deducting amounts due from excess of loss and other reinsurances) that the blank Fire Insurance Company could sustain if the loss on such risk were totaled and no other risk was involved in the same occurrence.”

Another example taken from another contract: “For all purposes of this agreement of reinsurance the net retained line of the reinsured shall not be considered as being reduced by any amounts recoverable from excess of loss reinsurance.”

A third example, taken from another contract: “It is understood and agreed that the company may effect excess of loss reinsurance in respect of its net retained liability, and notwithstanding anything herein contained to the contrary the afore-said excess reinsurance shall not be taken into account in calculating the net retention of the company for the purposes of this contract, nor shall it in any way prejudice the company’s right of recovery hereunder.”

Those, I think, are the main clauses that I have seen.

Q. Treaty clauses? A. Treaty clauses.

Q. Have you in your experience seen daily reports or certificates of reinsurance of the treaty reinsuring company to its reinsurers specifically mentioning such loss as affecting net retention?

(Testimony of John Alden Towers.)

A. I have. [186]

Q. May I ask you, to show the extent of your company's business, how does the company with which you are connected, compare in size with re-insurance companies of the same sort throughout the United States?

A. Ours is a brokerage company—a reinsurance brokerage company. If you mean how many clients we have—is that what you mean?

Q. Yes.

A. I haven't counted them recently, but I think 150.

Q. Has it ever been customary for your company in advising these clients to issue any periodical instructions with regard to net retention, or suggestions? A. About once a year.

Q. Have you, at my request, brought a sample of one of those with you? A. I have.

Q. Might I see it, please? (handed by witness to counsel) May I ask you with respect to these once-a-year instructions or suggestions you have reference to, they are sent to whom by your firm?

A. To our clients. Not necessarily once a year. I mean there is no annual sending of them out, but I would say roughly we have done it approximately that often.

Q. And are these clients to whom you send it all insurance companies?

A. All insurance companies or reciprocals which are clients of ours.

Q. When Mr. Cook has an opportunity to look

(Testimony of John Alden Towers.)

at it I will offer it in evidence, as illustrative of your testimony, regarding custom and usage. I offer it purely for illustrating the testimony of the witness. May I ask you another question in regard to this exhibit A-12. With regard to A-12 for [187] identification, this particular document you gave me, is that in similar form or not to other notifications of the same general nature?

A. It probably is not the same. It would not be in similar form, because we do not use a copy from one year to the next. We simply call attention to the fact especially on facultative placings, which are placed individually, they are more apt to overlook advice than they are on treaties.

Mr. Cook: I object to this, because obviously it is directed to the issue in this case. When it was prepared I do not know, but from reading it that is what is in my mind, and I don't think they can prove usage or prove the meaning of a particular term of usage by showing one specific event, and they are attempting to do that in this case. Expert testimony must be of a general character, and limited to the usage generally in the insurance business.

Q. Was this particular one prepared with reference to any issue in this case?

A. The same issue is involved exactly, and it is to avoid the issue that those letters have been sent out to them.

Mr. Dumett: This is dated August 12, 1942. For the moment I will not offer it.

(Testimony of John Alden Towers.)

Q. These instructions or suggestions which you testified you send out periodically, and approximately once a year, to your clients, what is the subject matter of those?

A. It is to caution them to advise markets to which they are ceding business of any excess of loss reinsurance which dips down into the retention named under the cession. The very thing we are discussing here.

Q. How long approximately has your company been advising its clients in that regard? Can you tell us approximately? [188]

A. 1933 is the first one I found.

Mr. Dumett: I think in view of Mr. Cook's objection on the date of this one, I will not offer this particular document. May I withdraw it?

The Court: Is there any objection to withdrawing it?

Mr. Cook: No, your Honor.

The Court: It is withdrawn, and it may be returned to the witness who furnished it.

Q. (Mr. Dumett) Mr. Towers, referring to plaintiff's exhibit "1", the Northwestern excess of loss policy, can you state whether or not that is a fluctuating or flat premium policy?

A. A flat premium policy.

Q. What does that mean?

A. The loss experience under the policy does not affect the rate for that particular policy. In other words, it is a flat rate policy, and not a fluctuating rate policy.

(Testimony of John Alden Towers.)

Q. A fluctuating rate policy is based on loss experience? A. Yes, sir.

Q. Subject to a minimum and a maximum rate, depending on the loss?

A. Subject to a minimum and a maximum rate, depending on the loss during the contract.

Q. You mean by that the rate may increase, depending on the experience?

A. The normal loss cost policy starts off with a rate based on a previous experience, usually sixty months. Then each year the experience under the contract is added to the previous experience, and the first year of the previous experience dropped, to the end that the same period of time is used to compute the loss cost percentage.

Q. In view of the customs and usages of the insurance business is a pro rata reinsurer customarily interested in whether the [189] reinsured's excess of loss coverage is on a flat or a fluctuating premium basis?

A. Well, naturally if the excess contract is on a fluctuating rate basis the ceding company has more interest in losses which occur than if it is on a flat rate basis. While the renewal rate on a flat rate contract is apt to be increased it is not mandatory. I mean you can change markets or refuse to renew, whereas under the fluctuating rate basis you must pay for having had your losses, by way of increased rates, and, therefore, such a contract it is more often ignored for purposes of net retained line than the flat rate contract.

(Testimony of John Alden Towers.)

Q. Exhibit "1" is a flat rate contract?

A. That is right.

Q. Under the customs and usages of the insurance business why is it important for the reinsuring company to be advised by the ceding company of excess of loss reinsurance as well as specific contributing reinsurance?

A. The company accepting the cession normally has very little information concerning the risk ceded. There is a certain amount of confidence established between the two parties else the contract would not have been entered into, and the company accepting the cession relies upon the amount that the ceding company retains net for its own account to determine how much it will retain net of that cession, or how much it will pay off by way of retrocession. Therefore, any type of reinsurance which tends to reduce the net amount of the risk of the ceding company affects the transaction. It causes the accepting company to realize that the ceding company has certain protection. If that is known then it acts accordingly.

Q. Can you illustrate why that is important to the reinsuring company? [190]

A. Well, we have placed contracts with very low net loss retention—excess of loss contracts. I think the extreme case is one of 499,000 over 1,000.

Q. When you say "499,000 over 1,000" you mean what?

A. That the reinsured company has a maximum loss retention of 1,000 on that risk, even though it

(Testimony of John Alden Towers.)

has issued its policy for half a million or more—well, for half a million, as it is issued for more than it is liable for on the 1,000. That is a very extreme case, but it shows how important it is for the accepting company to know of the excess of loss contracts which affect a loss on that particular risk. Otherwise that company could cede half, if it had a half million dollars, whereas it only has \$1,000.00.

Q. By reason of the excess of loss?

A. By reason of layers of excess, one on top of the other.

Q. In a case like the present one, if a reinsuring company in the position of the Union had in the daily report or a wire been advised by the re-insured company that the reinsured company was protected by an excess of loss policy similar to exhibit “1”, what would the reinsurer customarily do?

Mr. Cook: That is objected to as speculative, Your Honor—wholly so. He doesn’t know what the Union would do under those circumstances.

Mr. Dumett: I am asking about a company under similar circumstances.

The Court: The word “would” is inconsistent with “customarily.” It *should what* he customarily does.

Q. I will change the latter portion of the question to ask you what does, if you know, the reinsuring company customarily do? [191]

(Testimony of John Alden Towers.)

A. It would probably do one of two things, either——

The Court: No. Note the form of that question; what does it customarily do? Not what it probably would do, or something of that kind.

Q. It is a question of custom, from your knowledge of the business.

A. It either retrocedes a larger part than it would otherwise, or refuses to accept as much as the amount offered.

Q. In view of the assumed facts which I asked you to assume yesterday, and considering Article 8 of the Union-Northwestern treaty, and considering also Northwestern's excess of loss policy, exhibit "1", can you compute, Mr. Towers, the amount retained net by the Northwestern without reinsurance by the reinsured company at its own risk and liability on the same property—that is to say, on the Tacoma Narrows Bridge?

A. \$32,000.00.

Q. And this question, if you please: Again in view of the assumed facts and in view of Article 8 of the treaty, and in view of plaintiff's exhibit "1"; what, if you know, was the highest possible loss which the Northwestern could have sustained at its own risk and liability on this bridge in the event of any one loss? To the bridge itself?

A. The same answer: \$32,000.00.

Q. Could those computations have been made when the cession in suit was made in June, 1940?

A. Yes, sir. Because that is the maximum pos-

(Testimony of John Alden Towers.)

sible loss in the event what you call exhibit "1" was sound protection, which must be presumed.

Q. Referring to defendant's exhibit A-5, which is the daily report from Northwestern to the Union, which I believe you have read, have you not?

A. I have seen it. [192]

Q. Referring to that daily report, what is the meaning in the insurance business of the term PML? Counsel, I think, will want to preserve an objection to that, and I am willing to make the same stipulation.

Mr. Cook: Yes; I would like to renew the objection I made to this line of testimony. Your Honor, as it came out in the depositions, on the same grounds.

Mr. Dumett: I have no objection to that.

The Court: I am not sure I am advised what the Court's ruling was.

Mr. Dumett: The Court ruled it would be admitted subject to the agreement counsel's objection would run to that entire line of testimony on PML.

The Court: It being the same principle, the Court makes the same ruling now, and consents to the arrangement mentioned.

A. PML are the initials used to designate the probable maximum loss in the opinion of the underwriter ceding the risk.

Q. In the custom and usage of the insurance business, is that term used in reference to single

(Testimony of John Alden Towers.)

risk structures as well as multiple risk structures?

A. Yes, sir.

Q. Several risks? A. Yes.

Q. And to what extent, if any, is the term PML itself used to indicate the number of risks involved?

A. As it applies to either one or to more than one risk of a schedule or blanket form, it is apparent it does not mean, or it does not indicate the number of risks.

You might have a cession on one risk which is a total loss property, where the PML is stated as 100%. On another risk you might have a fire resistive building with cut-off. The estimate [193] of the underwriter might be much lower than 50%, 20% or even in the case of a large fire resistive building, as low as 5% PML.

In the case of one building I happen to know of 44 stories, each floor cut off, a modern fire-resistive building, estimated as 5% PML.

Some underwriters would say each one of those floors might be a risk. Others might say three or more floors would be a risk. PML does not indicate the number of risks. It indicates the probable maximum loss which the accepting company can expect on that particular cession.

Q. Under the customs and usages of the insurance business how do reinsuring companies customarily indicate the number of risks involved, if more than one?

A. Usually by separate cessions, if it is a treaty

(Testimony of John Alden Towers.)

which calls for binder notices or cessions. However, in some cases the cession will show various risks, or 20 or 22 risks, naming the number of risks. If it is a treaty which only calls for a bordereaux report that information is unusually put in the "Remarks" column, if it is more than one risk.

The Court: At this point I wish you would remind the Court of your understanding of the usual meaning of a bordereaux.

A. A bordereaux is a statement usually made monthly under a treaty to show the information which the accepting company requires for its underwriting purposes, its accounting records and its reports to its own state department. Bordereaux statements have become less and less detailed as years have gone by, as the volume increased, until now it is quite a brief statement, usually showing the cession number, name of the assured, location of the assured, amount of retained net by the ceding company, amount ceded, whether it is a one-year, three-year or [194] five-year policy, and the premium.

Q. (Mr. Dumett): It is a type of report then, I take it, from the reinsured company to its reinsurer, to advise the reinsurer of the things it wants to know?

A. Yes, sir; that is right.

Q. Mr. Towers, to what extent is the book called Best's Reports used by reinsuring companies in considering cessions from reinsured companies?

(Testimony of John Alden Towers.)

A. Oh, I don't think it is used in considering cessions. It is one of the best known reference books. The Spectator is another similar book. There are others, the Argus Field and the Weekly Underwriter. I doubt if they give as full information as the Spectator or Best's. It could not be used for cessions, because it is presumed the companies dealing between themselves know more about the position of each company than Best himself would know.

Q. And in the custom and usage of the business to what papers do the parties ordinarily, in the transmitting and considering of cessions or reinsurance—what are the basic papers that they look to, generally speaking?

A. When you say "papers" you restrict me.

Q. Documents or sources of information.

A. When two parties meet they probably know of each other's company; they know its reputation and standing; they discuss the possibility of reinsuring with each other, or one with the other, if it is a one-way treaty, and in that discussion it is normal for questions entering into the transaction to be discussed between the parties. Then usually some confirming letters are exchanged, and a treaty results, such as this treaty here.

Q. And after that then the mechanics are what in actually placing the insurance? [195]

A. The placing of the business as provided by the treaty contract.

(Testimony of John Alden Towers.)

Q. Is that where the daily reports—is that the correct term—where the daily reports come in?

A. They all mean the same kind or thing—the cession of binder notice, or daily report or bordereaux; they all accomplish the same purpose.

Mr. Towers, you have testified that in view of the custom and usage of the insurance business, the definition of net retention, as given in Article 8 of the treaty, would result in a computation of net retention on this bridge of \$32,000.00, under Article 8. I want to ask you this question: Assume that on November 7, 1940, the date of the collapse of the Tacoma Narrows Bridge, the same wind storm that destroyed the bridge destroyed another bridge; Bridge B—in the same vicinity; and assume further the Northwestern at that time had issued and outstanding a policy covering Bridge B, identical in form with its policy on the Tacoma Narrows Bridge—in other words, a \$350,000.00 policy—which it had ceded down specifically to \$50,000.00; assume that the windstorm of November 7, 1940, totally destroyed both bridges; now assume those facts and considering Northwestern's excess of loss policy, Exhibit No. 1, what would have been the amount of the ultimate loss the Northwestern itself would have paid?

\$A. \$37,000.00.

Q. That \$37,000.00, would that be the ultimate loss covering both bridges, the Tacoma Narrows Bridge and Bridge B?

(Testimony of John Alden Towers.)

A. I understand if you had the two bridges you would have \$100,000.00 loss, and the excess contract covers 90% above thirty, so the first thirty, plus 10% of the next seventy, or \$7,000.00, makes up the \$37,000.00 loss.

Q. Now how would that \$37,000 loss be allocated as to each bridge? [196]

A. For what purpose would it be allocated?

Q. For the purpose of determining as near as possible what share each bridge had in that loss. I am probably stating it inaccurately, but of the \$37,000.00 loss the Northwestern would have to pay, what it would be fair to allocate to each bridge?

A. For the Company's own records if the loss was total on each bridge and the amounts were the same, it would allocate half the loss to one bridge and half to the other.

Q. That would be \$18,500.00?

A. Yes, sir; \$18,500.00 each.

Q. Now assume the same facts I just asked you to assume, but assume a third bridge, Bridge C, in the same district, and covered by the identical insurance, if you don't mind, covered by the identical insurance, the three bridges totally destroyed by the same wind storm on November 7, 1940, and again apply Exhibit No. 1, the excess of loss policy, what would be the ultimate loss of the Northwestern itself in that event, the total loss of three of them?

A. You would have the \$30,000.00 again as the

(Testimony of John Alden Towers.)

first loss retention, and the balance of the loss being \$120,000.00, you would have 10% of \$120,000.00 or \$12,000.00, making a loss total of \$42,000.00 on the three bridges.

Q. \$42,000.00. And if you allocate that on the same basis with three bridges, that would be what for each bridge?

A. One-third of \$42,000.00 is \$14,000.00 each.

Q. Now do the answers which you have just given to these two hypothetical cases, to the two bridges and the three bridges, do the answers which you have given to those questions affect in any way the testimony you have previously given that under Article 8 of the Northwestern-Union treaty the amount retained [197] net by Northwestern without reinsurance at its own risk and liability was \$32,000.00?

A. No. It would still be \$32,000.00, because you do not consider any but the one risk ceded. The retention, if any, would be reduced but it would not be customary for a company to contend that the net carried was less than it would have been had no other risk been involved in the loss. Catastrophe coverage, in other words, is not customarily considered in arriving at the net loss retention on an individual risk.

I say catastrophe cover as I have previously defined it, which is a cover in excess of the net loss retention on any individual risk.

Q. By the way, what is the distinction—you may have covered this, but I am not sure—what is

(Testimony of John Alden Towers.)

the distinction, if any, between your terms "net retention" as defined by Article 8, retained net without reinsurance at its own risk and liability, what is the distinction between that and ultimate loss?

A. Well, the amount retained net is the amount which is the maximum that the reinsured company could lose in the event of a total loss.

The loss might be partial, so the ultimate net loss might be anything from one penny up to the amount of the liability, net retained liability. They are entirely different things.

Q. Can the exact amounts of ultimate loss ever be determined in advance of a loss?

A. You would have to have a loss.

Q. Can the amount retained net without reinsurance at its own risk and liability be determined without a loss?

A. Yes, sir. The net retained line at its own liability can be determined.

Q. Because it is named at the time of the cession? [198]

A. At the time of the cession.

The Court: What does the word "line"—l-i-n-e (spelling)—mean as you used it there?

The Witness: The same as liability.

Q. (By Mr. Dumett): Again in view of your testimony regarding the \$32,000.00 net retention, as defined in Article 8, I would like to ask you, assuming the Tacoma Narrows Bridge was insured in accordance with the facts stated here, had sustained ten separate and distinct losses over the pe-

(Testimony of John Alden Towers.)

riod of a year, each loss resulting from a separate and distinct cause, what would have been the aggregate ultimate loss that the Northwestern itself would pay?

A. How much was each of those ten losses?

Q. I am assuming \$5,000.00 each.

A. They would have paid \$50,000.00, because the excess commences at thirty, each and every occurrence, and these being different occurrences the excess cover would not have come into play.

Q. In other words, Plaintiff's Exhibit No. 1, the excess of loss policy, you say would not have come into play at all? A. That is right.

Q. Because no one separate loss was large enough to reach the \$30,000.00?

A. That is right.

Q. By the way, I wish you would clear this up, if you can. In the event of a series of separate losses, separately caused, as I have just assumed, where the amount left after specific reinsurance was \$50,000.00, as here, one first loss of \$5,000.00, we will say today—what happens—is the insurance reduced from \$50,000.00 to \$45,000.00, or what?

A. It is, but it is customarily reinstated back to the \$50,000.00 after each loss. [199]

Q. I will ask you to assume one other thing. I asked you to assume five separate losses. Assume you had ten separate losses on the Tacoma Narrows Bridge over the period of a year, each loss resulting from a separate and distinct cause, what

(Testimony of John Alden Towers.)

would the aggregate loss of the Northwestern be?

A. I think you asked about ten before.

Q. Assume twenty separate and distinct losses on the Tacoma Narrows Bridge over the period of a year, and assume each of these losses was due to a separate and distinct cause, and assume that each of these twenty separate losses amounted to \$10,000.00, what would be the aggregate ultimate loss which the Northwestern would have to pay?

A. That is twenty losses at \$10,000.00 each?

Q. Yes. Make it twenty losses of \$5,000.00 each.

A. Twenty losses at \$5,000.00 each, again assuming that each was reinstated, would cause an aggregate loss of \$100,000.00.

Q. In that assumed case may I ask would the Northwestern's excess of loss policy come into play?

A. It would not.

Q. No one loss would have reached the \$30,000.00?

A. That is right.

Q. Do the answers which you have given to these last two hypothetical questions, the separate and distinct losses, separately caused, do those answers affect the answer you have given previously that the amount retained by the Northwestern at its own risk and liability was \$32,000.00?

A. No; because in the other cases you have taken partial loss examples, and as I say the net loss has nothing to do with the net retained liability, that is, they are distinct and separate things.

Q. Of course if a couple of separate losses occur within a 48-hour [200] period I believe that

(Testimony of John Alden Towers.)

would be one loss, under Exhibit No. 1, would it not? A. If they are due to wind storm.

Mr. Dumett: You may examine, counsel.

Cross Examination

By Mr. Cook:

Q. Mr. Towers, you are acquainted, I assume, with all four of the gentlemen whose depositions were taken in New York?

A. No; I never met Mr. Thompson.

Q. The other three you are acquainted with?

A. Yes.

Q. Mr. Pryce, I believe, is a director of your Company? A. That is right.

Q. And a business associate of yours?

A. Naturally.

Q. You have discussed, have you not, this situation with Mr. Pryce? A. Many times.

Q. And you had prior to the time he gave his deposition in New York?

A. Even prior to the case being filed.

Q. And you have discussed it, I assume, with the counsel in New York who appeared for the Union at the taking of those depositions?

A. Yes. Not to any great extent.

Q. How many times did you discuss it with them?

A. Over long distance telephone two or three times.

Q. With Mr. Muller? A. Yes.

Q. Now in relation to your testimony, Mr. Tow-

(Testimony of John Alden Towers.)

ers, I take it you make a distinction between a true excess of loss policy and a [201] catastrophe policy?

A. Both are excess of loss, but one is called a catastrophe because the attachment point—the net loss retention is greater than the maximum net line on any one risk. In other words, it will not affect—it will not be called into play on an individual risk—correct.

Q. All right. The true distinction between an excess of loss policy and a catastrophe policy is whether or not the attaching point is lower than the Company retains on one risk?

A. That is right.

Q. Is that not correct?

A. That is right. I would go a little further and say that normally they are written on the basis of two or more risks, but my personal opinion is that you could call a cover which does not come into play on one risk a catastrophe cover.

Q. So that any policy, the attaching point of which is higher than the amount the Company retains on a single risk, in your judgment, is a catastrophe policy?

A. Yes. I would call it a loss retention catastrophe policy.

Q. While an excess of loss policy is one which attaches below the amount retained by the Company on a single or individual risk?

A. That is right.

Q. And it is for that reason that you have in your judgment termed Plaintiff's Exhibit No. 1

(Testimony of John Alden Towers.)

an excess of loss policy rather than a catastrophe policy?

A. I said it was a combination of both, I think, Mr. Cook.

Q. I think you did. But for that reason you consider it at least partially an excess of loss policy?

A. That is right.

Q. You heard the depositions of these four gentlemen which were read yesterday, did you not?

[202]

A. Yes, sir.

Q. Do you recall that their distinction and their definition and the reason they assigned for calling Exhibit No. 1 an excess of loss policy was for the same identical reason which you have assigned?

Mr. Dumett: Just a moment. That is objected to on the ground it is not proper on direct examination or cross examination to ask this witness to summarize, interpret, or construe the testimony of other witnesses. What that testimony may have been the Court will recollect, and it is in the record. It is proper to ask this witness anything bearing on the views he has expressed here, as his own view, but not to comment upon or construe the testimony of other witnesses. I think it is improper cross examination, and I object for that reason.

The Court: I think the question as put is subject to the objection. This witness can be asked to assume such and such a situation is in the record.

Mr. Cook: I will not stress it.

The Court: The objection is sustained.

(Testimony of John Alden Towers.)

Q. (By Mr. Cook): The thought I had is simply this—let me ask you this way. The definition which you have given and the distinction which you have made between those two policies is the recognized and definition in the insurance world, is it not?

A. I think that those familiar with excess of loss covers would hold to somewhat the same opinion, but I do not agree with you that the answers in those—

The Court: That has been disposed of.

Mr. Dumett: Yes. It has been stricken.

Q. (By Mr. Cook): But you do agree with me that your definition, as you have given it, is the correct and accepted one in the insurance world?

[203]

Mr. Dumett: That question has been asked and answered.

A. I would say that is my opinion.

Q. (By Mr. Cook) All right. Going one step further, you testified yesterday, and I believe again this morning, that it was neither customary or necessary in your judgment for a company to report the existence of a catastrophe policy when making specific cessions?

A. I said out of an abundance of caution it would normally be done, but I did not think it was necessarily done, and not always done by any means.

Q. You have the distinction I am making between catastrophe and excess of loss?

(Testimony of John Alden Towers.)

A. That is right. And the question pertained to catastrophe covers, did it not?

Q. That is right.

A. Yes, sir; that is right.

Q. And did you not further say the reason why it was not necessary to report the existence of a catastrophe policy was because the attaching point was above the amount retained on a single risk?

A. Yes. And would not affect the underwriting of the ceding company on that risk directly; only in the event it would be involved in one occurrence with other losses, which does not affect the underwriting of a company in a normal way.

Q. And in reporting the amount retained the Company need not consider anything which they would collect if more than one risk is involved in a loss?

A. Yes, sir. They must consider anything that they would collect on that particular risk. In other words, if the retention on the risk ceded—if the retention under the catastrophe cover exceeds the amount retained net on the risk ceded, and they [204] could collect in the event of a total loss if no other risk were involved, they should report it. I don't know whether that is your question, but that is what I understood your question to be.

Q. That was not my question, Mr. Towers. My question was this. That where the amount retained is less than the attaching point of the catastrophe

(Testimony of John Alden Towers.)

policy on a single risk, then that catastrophe policy need not be considered in reporting that retention?

A. That is correct. If the retention—net loss retention—catastrophe cover under an excess of loss cover exceeds the amount retained net by the company ceding, I would say it would be customary for the accepting company to waive the coverage—to ignore it.

(Short recess)

Q. (By Mr. Cook) Mr. Towers, getting back to this same thought we had before recess, do I understand that if the retention as reported by the Northwestern to the Union had been less than \$30,000.00 on a single risk, then there would be no complaint on the part of the Union?

A. It would be customary that there would be no complaint. I cannot say what the Union might have done.

Q. (By Mr. Cook) If the retention of the Northwestern on a single risk was less than \$30,000.00 would the method employed here be in accordance with the practice of the insurance world?

A. My answer is yes.

Q. And there would be in your judgment no need for them to have said anything about the existence of Plaintiff's Exhibit No. 1?

A. It would normally have been done, but not on a cession. It would normally have been done at the time the treaty was in force, and normally the treaty would have said, "Catastrophe [205] rein-

(Testimony of John Alden Towers.)

insurance ignored for the purpose of this contract," or words to that effect.

Q. But it could have no effect if their retention on a single risk was less than \$30,000.00?

A. It would not be customary to object to the claim—that is really what you are after.

Q. Then doesn't this lawsuit narrow itself down to this point, and that is what was the net retention—

Q. (By Mr. Cook) Before we get into that, will you explain what is a single risk in the insurance world?

A. Well, I spent three weeks trying to word a definition of single risk which would be approved by certain underwriters on a contract before I got an answer which was approved, and later found that there were flaws in that definition, and so I am afraid I cannot answer that question.

Q. To the best of your ability can you define to the Court what is a single risk?

Mr. Dumett: You mean the witness' own definition or the customary definition?

Mr. Cook: I mean the customary accepted definition in the insurance world.

A. I finally defined it by stating what was more than one risk, which was that two properties unlikely to be affected in the same occurrence would be considered as more than one risk.

Q. (By Mr. Cook) You referred to a 44-story building located some place that you were familiar with, a fire-proof construction, I believe you said,

(Testimony of John Alden Towers.)

with cutoffs between each floor, and so forth, and you said that some underwriters would consider that as 44 separate risks, I believe?

A. For fire purposes.

Q. For underwriting purposes? [206]

A. Underwriting fire.

Q. For placing insurance on that building?

A. Not tornado or wind storm.

Q. But underwriting a fire policy on that property?
A. That is right.

Q. And the reason for that was because each floor, in the judgment of the underwriter, was a separate unit subject to damage by a single fire?

A. That is right; in that particular underwriter's judgment.

Q. And you would have there in that one building 44 separate risks in the judgment of that underwriter?

A. Except that he called it 5% P.M.L., showing he didn't mean that 5% P.M.L. meant 44 risks. In other words, it was his judgment that not more than 5% of the value would be involved in a loss?

Q. It is of course customary in all kinds of insurance, is it not, for an underwriter to determine the number of risks on a particular property?

A. An underwriter reviews the diagram of the risk or such inspection reports as he might have or descriptions of the risk, and determines to his own satisfaction whether he considers it more than one risk, yes, for the purposes of the perils covered.

(Testimony of John Alden Towers.)

Q. That is the customary and accepted method of underwriting property, is it not?

A. Yes, sir. And this opinion varies with different underwriters.

Q. Do you know how many risks the Tacoma Narrows Bridge was underwritten by the Northwestern as?

A. For what peril?

Q. For the policy which is involved in this case.

A. The policy involved covers many perils. It covers collapse, wind storm, fire, flood, earthquake, and so forth. So the bridge—I am guessing—I have no way of knowing what the [207] Northwestern did, but I am saying it would be normal——

Q. If I may interrupt. My question is, do you know how many risks this bridge was underwritten by the Northwestern as?

A. I cannot imagine it being over one risk.

Q. You don't know? A. No.

Q. Assume that the Tacoma Narrows Bridge was underwritten by the Northwestern for the policy involved here as two separate risks, in reporting net retention to the Union Mutual would the Northwestern have had to consider, in your judgment, or in the custom and practice of the insurance world, the existence of Plaintiff's Exhibit No. 1?

A. I cannot assume that, because if they had——

Q. (By Mr. Cook) Just a moment, please. I am asking you to assume that. You don't have to pass on the merits of it at all. But assume as a fact that this bridge was underwritten by them as two separate risks, then would Exhibit No. 1 have had

(Testimony of John Alden Towers.)

to be considered by them in reporting a retention of \$50,000.00 to the Union Mutual?

A. My answer is that you cannot make black out of white, and that even though the ceding company is the sole judge of what constitutes one risk, that does not give him the right——

A. (continuing) ——to cede what would be customarily called one risk as two risks, and the fact that the ceding company wired for permission to exceed the limit named in the treaty of \$25,000.00 indicates quite strongly that the ceding company realized——most underwriters would consider this one risk. [208]

Q. (By Mr. Cook) Assume that the Northwestern Mutual actually underwrote this bridge as two separate risks——

The Court: Namely, please. Let the witness know the two you have in mind, by stating them in your question.

Q. (By Mr. Cook) Two separate units subject to a loss. You understand what I mean by a risk in that question.

A. I am afraid I cannot conceive of a bridge insured against the peril of collapse and earthquake——

Q. My question is if you understood the term as I used it.

Mr. Dumett: I think it would be better to let him answer it and if it is not proper I will concede it be stricken.

The Court: I think the objection should be sus-

(Testimony of John Alden Towers.)

tained. The Court has directed that in fairness to the witness you state what you mean by two risks, by naming the two you have in mind when you say two, so your question will contain the statement.

Mr. Dumett: I think in fairness to the witness if Mr. Cook would specify in his assumed facts that he is asking the witness to assume—the difficulty is it is too vague—if he would ask the witness in the assumed facts to assume two risks, A and B, the witness might have a better understanding of it.

Mr. Cook: Strike the question.

Q. (By Mr. Cook) Assume that this bridge was actually underwritten by the Northwestern as two separate risks, as that term is used in the insurance world, meaning to me, at least, two units of [208a] that property subject to a single loss from one cause, then in that event under the practice in the insurance world would the existence of Plaintiff's Exhibit No. 1 have to be considered by the Northwestern in reporting their net retention?

A. My answer is yes, because of the two units are subject to the same loss in one occurrence the existence of this excess reduces the ultimate net line, because they must be considered together. There is a certain good faith between companies as to underwriting practices. The Northwestern and the Union Mutual having dealt for years——

Mr. Cook: I submit the witness is arguing the merits now.

A. The answer is yes. I was only explaining for your benefit, Mr. Cook.

(Testimony of John Alden Towers.)

Q. (By Mr. Cook) The basis of your answer is yes, as I understand you, because both units were subject to the same loss event?

A. That is right.

Q. Is it not a fact that in designating separate risks in a property it is done on the basis that each risk is not subject to the same loss event?

A. That is right.

Q. If this bridge then is underwritten as two risks it is underwritten because in the judgment of the underwriter each unit is not subject to the same loss event, is that not true?

A. If it was so underwritten, but your question put to me was the two units were subject to the same.

Q. You misunderstood me, I believe. I meant to say they were not subject to the same loss event.

A. Will you re-read that question, please?

(The reporter thereupon read the question as follows, to-wit:

Q. "Assume that this bridge was actually underwritten by the [209] Northwestern as two separate risks, as that term is used in the insurance world, meaning to me, at least, two units of that property subject to a single loss from one cause, then in that event under the practice in the insurance world would the existence of Plaintiff's Exhibit No. 1 have to be considered by the Northwestern in reporting their net retention?")

Q. (By Mr. Cook) My thought was using the word "risk" in its accepted sense in the insurance

(Testimony of John Alden Towers.)

world, where each risk is subject to a loss by one cause.

A. In other words the two risks are not subject to the same loss?

Q. That is right.

A. That would reverse my answer.

Q. In other words, under that set of facts, in the accepted practice of the insurance world, it would not be necessary for the Northwestern to consider Exhibit No. 1?

A. Mr. Cook, I must again say in the accepted practice of the insurance world if the same peril is expected to involve all of the units, as you put them in the property, then for that purpose they are one risk; and, therefore, I must say that that would not be the accepted practice.

Q. But the basis of my question, Mr. Towers, was that the two risks were not subject to the same loss.

A. If they are not then my answer is there would be necessity—technical necessity—for reporting the existence of Exhibit No. 1,—I think you called it.

A. Will you refer to Article 8 of the treaty between Northwestern and the Union. Do you find there in that contract this provision: "Provided, one, the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company." Do you see that provision?

A. It is quite a normal provision, yes, sir. [210]

Q. That is what I was going to ask you. Is it not

(Testimony of John Alden Towers.)

customary for such a provision to be included in reinsurance treaties such as this one?

A. That is correct.

Q. (By Mr. Cook) Mr. Towers, I have just a few additional questions. Do you recall the illustration which counsel gave you concerning first the Tacoma Narrows Bridge and then Bridge B, upon which identical policies had been issued, and then in his third assumption there was a third bridge, with an identical policy? A. Yes.

Q. And I believe you stated under those circumstances the net retention of the Northwestern would not be changed or affected by reason of the fact that there were the three bridges, is that right?

A. In so far as the pro rata treaty between the Northwestern and the Union was concerned, that is correct.

Q. And the reason for that, as I understood it, was because there were three separate risks involved? A. Yes.

Q. Now let me ask you to assume in that same situation instead of the net retention being \$50,000.00 that it was \$25,000.00, then in that event in reporting their net retention to the reinsuring company would it be necessary for the Northwestern to consider the existence of Plaintiff's Exhibit No. 1, which is the Lloyd Policy?

A. Considering the same three separate bridges as the example?

Q. Yes, sir.

(Testimony of John Alden Towers.)

A. I would repeat that according to the custom it would not be necessary.

Q. And the reason for that is that there were three separate risks [211] involved?

A. That is correct. But I say also that normally it is—I will not say normally, but I will say that often the treaty makes mention of catastrophe coverage. Technically it is another thing. My answer is custom and practice.

Q. And your custom and practice is that it would not be referred to?

A. No. Technically as the excess cover would reduce the loss through a pro rata proportion it would be my opinion, and that is why we advise clients to mention such coverage that it would affect the net loss, but that is not the custom.

Q. I suppose you would say the Plaintiff's Exhibit No. 1 might reduce the loss but would not affect the retention, is that right?

A. That is correct. It reduces the maximum that a company can sustain in any one occurrence, and indirectly affects the net retained line, but companies have in so many instances waived that question that I would say it is common practice not to object to catastrophe coverage.

Q. Now referring to the question of premiums on various kinds of policies, is it not a fact that premiums on excess of loss contracts, as an ordinary thing, are affected by the loss experience of the company?

A. We have many both ways. We have what is

(Testimony of John Alden Towers.)

known as the flat rate, and we have some that are not even a rate. The premium is not developed by a rate applied to the premium income of the company. It is a flat agreed annual premium. That is a rather unusual type. I would say not over five or ten per cent. of our covers are on that basis. I would say that probably thirty or forty per cent. today are on the flat rate basis and that the balance, which is the majority, are on the fluctuating rate basis determined by the loss experience. [212]

Q. May I ask you now in answering that question, having in mind the distinction which you have made between an excess of loss contract and a catastrophe contract, do you have that in mind?

A. No, I had in mind excess of loss. Catastrophe covers are usually either flat annual premium contracts, or flat rate contracts.

Q. That is the point I was interested in. There is a distinction between what we have been talking about as excess of loss contracts and catastrophe contracts.

A. Of course, the premium—the method of calculating the premium would not be a guide as to the type of cover, because originally we charged a percentage of the excess premium on each and every risk. For example, if the retention was \$30,000.00 and the amount of liability was \$100,000.00 the reinsured would pay some agreed percentage of the top \$70,000.00 premium—that is, for the portion upon which it was liable, but that involved a great deal of detailed calculation, it became cum-

(Testimony of John Alden Towers.)

bersome, and these ways were devised to simplify the accounting end, making it a wholesale method of operation, and at that time we named flat rate premiums applying to the whole premium income, because the whole premium income must be reported to the State, and it was very simple for a company to advise us of their premium income and apply this rate to it. So that is the main modern method.

Q. Is it a fair statement to say that as a general rule the premium on catastrophe contract is a flat rate or a specified form?

A. Not as a general rule. We have many that are flat rate—annual contracts. The fluctuating rate contract is normally a term contract or a continuous contract. The annual contract may have also a fluctuating rate, but is normally a flat rate contract. [213]

Those which do not have the flat rate provide that the rate shall increase retroactively for the period the contract was in force, if the losses exceed a certain percentage of the premium. I mean that is the normal way.

Q. You are speaking now of catastrophe contracts as distinguished from excess of loss contracts?

A. No. I am still speaking of excess of loss.

Q. You must have misunderstood my question. It was directed wholly to the catastrophe contracts.

A. Catastrophe contracts as such are usually annual contracts; annual sometimes plus odd times to bring about an expiration date for the year-end.

(Testimony of John Alden Towers.)

And they are usually on a flat rate basis or a flat premium basis.

Q. At a specified sum for the period?

A. Yes, sir.

Q. And Plaintiff's Exhibit No. 1, this Lloyd Policy, do you have a flat rate on a specified form?

A. That is right. It is an annual contract with a flat rate adjustment.

Q. I believe you stated that had the Union Mutual known of the existence of this Lloyd Policy, Exhibit No. 1, they would have done one of two things, either reduced the amount they would accept, or protect themselves by proper ceding off to other companies?

A. I said that was my opinion of a customary procedure.

Q. Yes. Did you know that the Union Mutual carried an excess of loss policy, beginning at \$15,000.00?

Mr. Dumett: I object to that as being improper cross examination and not relevant to any issue in the case. What the reinsurer may have carried is not material to this issue.

The Court: You mean the Union Mutual? [214]

Mr. Cook: Yes, Your Honor. I meant to inquire further whether that fact would have any bearing on the opinion which he expressed.

The Court: The objection is overruled.

Q. (By Mr. Cook) My question is whether or not you knew that the Union Mutual did at this

(Testimony of John Alden Towers.)

time carry an excess of loss contract, with an attaching point of \$15,000.00?

A. I think they did not, except as regards one peril.

Q. Was that wind storm? A. Wind storm.

Q. If that is the fact that they did carry such a policy, would that have any effect on the answer which you gave as to what they probably would do?

A. I read the testimony of Mr. Legris, and according to that testimony they reinsured specifically in this case down to \$15,000.00.

Q. Yes.

A. If they reinsured down to \$15,000.00, believing—I say if they did—and if they believed the Northwestern would have had \$50,000.00 net, it would seem logical to me they would have reinsured down to say \$9,000.00, had they thought the Northwestern had \$32,000.00, but that again is only a logical conclusion.

Q. That is just your surmise based upon what you know about it? A. That is right.

Q. They were, according to Mr. Legris, reinsured for everything above \$15,000.00?

A. I think that is what his testimony read.

Mr. Cook: I think that is all.

Redirect Examination [215]

By Mr. Dumett:

Q. Mr. Towers, counsel in his cross examination asked you, if I recall the question correctly, to de-

(Testimony of John Alden Towers.)

fine, if you could, a single risk. My memory of your testimony was you said it was difficult in the insurance world to express a definition of a single risk. You did mention though the definition which met apparently with your approval, defining what more than one risk was, and my recollection of your testimony that being more than one risk means two properties unlikely to be affected in the same storm—I presume that would be two or more properties unlikely to be affected on the same risk. Have you in your experience in the insurance business had come to your attention any other definition of that term with an authoritative background?

A. May I correct you? I said I arrived at a definition which was satisfactory to Lloyd's underwriters and accepted by them. I don't like it myself very well. [216]

Q. Yes; that is what you said.

A. Yes. I have read a definition of one risk which was prepared from a source as authoritative as I know of, a consensus of opinion source, from questionnaires.

Q. Does it come anywhere near what you think the proper definition is?

A. It is as good as I could do, but I don't think anyone can do very well on it.

Q. Give us that.

A. "The same risk refers to one fire area and not to the probable maximum loss. For instance, the probable maximum loss on a fire resistive building might be 50% but the building might be all one

(Testimony of John Alden Towers.)

fire area. In such a case the building would constitute one risk."

Q. What is the authority for that definition?

A. That is a definition prepared by Mr. Green, who is secretary and lawyer, I believe also, for the Federation of Mutual Fire Insurance Companies, which is an association that most of the mutuals, including these two parties, belong to. [216a]

Q. (By Mr. Dumett) Let me ask this question. Do you recall a question you were asked on cross examination with respect to what would be customary in the event the Northwestern had underwritten this bridge as two risks, in which your answer was interrupted? Do you recall the occasion?

A. I recall that that question was asked, but I don't remember what question it was, that I was not permitted to finish.

Q. The question, I believe, was assuming that the Northwestern had underwritten this bridge as two risks, and in view of the treaty in suit.

A. Yes, sir; I think that was the question.

Q. (by Mr. Dumett) Under the customs and usages of the insurance [216b] business and in view of the terms of this Union-Northwestern treaty, does the ceding company, under such a treaty, customarily or necessarily ask its reinsurer for special authority to exceed the one-risk limit, if it considers the insurance strictly as involving two or more risks?

A. It would not be necessary to ask for special permission to write more than \$25,000.00, unless

(Testimony of John Alden Towers.)

the ceding company felt they were exceeding the limit named in the contract, which is \$25,000.00 on any one risk.

Mr. Dumett: I think that is all.

Recross Examination

By Mr. Cook:

Q. You referred to a definition of one risk as being the same risk referring to one fire area. Will you concede there may be more than one fire area in a single building?

A. Yes, sir. According to this definition that was read, regardless of the number of fire areas the whole building is considered one risk. Now I read that because that is the consensus of opinion of others. I might not personally agree with it.

Q. Let me ask you this. Is it in your judgment the consensus of opinion in the insurance fraternity there may be several risks in one building, several individual risks, as we speak of it?

A. From the fire standpoint, yes; from an earthquake standpoint, no; from collapse, no. That is the thing. That is why it is impossible to define, in my opinion, one risk.

Mr. Cook: That is all.

Mr. Dumett: That is all. [217]

Thereupon, counsel for the Defendant offered Defendant's Exhibits A-14, A-15, A-16 and A-17, and the same were received in evidence.

Mr. Dumett: I have not further witness, but I

(Testimony of John Alden Towers.)

wish to present a small amount of documentary proof.

If the Court please, and counsel, I have had marked for identification three documents. The first, identified as Defendant's Exhibit A-14, is an exemplified copy of the report of examinations of the Northwestern Mutual Fire Association of Seattle, and on the authority of the National Association of Insurance Commissioners, under date of December 31, 1938. The copy is exemplified in accordance with the rules of civil procedure, certified by the Insurance Commissioner of the State, and exemplified by the Secretary of State under the seal of the Secretary of State, complying strictly with the rule in that respect, which makes its identification complete on being so exemplified. The exemplification sets forth that it is a copy of the original record in the office of the Insurance Commissioner and he has custody of it.

Exhibit A-15 is an exemplified copy, exemplified in the same manner, the report of the examination of the Northwestern, bearing date December 31, 1939, by the Insurance Commissioner of the State of Washington; and the third document identified as Defendant's Exhibit A-16 is a further exemplified copy, exemplified in the same manner, of the report of examination of the Northwestern Mutual Fire Association, bearing date December 31, 1940, by the Insurance Commissioner of the State of Washington; all three documents being official records of his office.

(Testimony of John Alden Towers.)

A word of explanation of the purpose of such records. These are three documents which speak for themselves, and they are offered in connection with the rebuttal or surrebuttal of the Defendant on this question [217a] of custom and usage, and bears on the testimony of Mr. John F. Sullivan one of the witnesses called as an expert by the Plaintiff, and who, over the objection of the Defendant, was permitted to testify as to custom and usage as bearing upon the issues in this case.

Now then these reports, which are tantamount to the originals themselves, exemplified as they are, and which were specifically referred to by Mr. Sullivan, are offered for the purpose of proving that Mr. Sullivan's testimony is utterly without basis.

Mr. Sullivan was very much mistaken. These reports, according to my reading, and if I am incorrect it can be readily shown by the documents themselves, according to my reading there is not a word in any of these documents that bears out what Mr. Sullivan said.

There is no reference to terms of excess or catastrophe cover, and since that was a part of his testimony bearing on custom and usage, it is important to show Mr. Sullivan was entirely mistaken, and the reports do not contain what they say they contain, and I offer the documents themselves with that explanation. [217b]

The material parts of these exhibits were as follows:

(Testimony of John Alden Towers.)

DEFENDANT'S EXHIBIT A-14:

This is the report of an examination of the plaintiff Northwestern Mutual Fire Association for the period ending December 31, 1938, made by examiners from the Insurance Departments of the States of Washington, North Carolina, Georgia and Oregon.

(Original exhibit sent up—Clerk.)

DEFENDANT'S EXHIBIT A-15

This exhibit is a report of examination of the plaintiff Northwestern Mutual Fire Association for the period ending December 31, 1939, made by the Department of Insurance of the State of Washington.

Reinsurance

(Original exhibit sent up—Clerk.) [218]

DEFENDANT'S EXHIBIT "A-16"

This exhibit is a report of examination of the plaintiff Northwestern Mutual Fire Association for the period ending December 31, 1940, made by the Department of Insurance of the State of Washington.

Reinsurance

(Original exhibit sent up—Clerk.)

(Testimony of John Alden Towers.)

DEFENDANT'S EXHIBIT "A-17"

(Original exhibit sent up—Clerk.)

This exhibit consists of various reports of re-insurance placed in the years 1939, 1940 and 1941 by the plaintiff with the defendant upon printed forms identical with printed forms used in defendant's Exhibit "A-5". The material items of these cessions are as follows:

Amount Ceded:	Retention by plaintiff:	P.M.L. %	Number of Separate locations of property insured:
\$ 5,400	30,800	33	17 (separate schools)
20,400	60,000	37	8 (separate schools)
(M26,000 A19,542)	M63,000 A47,250)	22	27 (in 12 towns)
13,330	66,649	26	22 (Including 16 separate schools)
(M 2,500 A 2,222)	M20,000 A17,776)	44	5 (in 5 towns)
(M10,000 A 2,850)	M50,000	23.3	10 (in 5 towns)
20,000	50,000	20	12 (in 12 separate schools)
15,000	21,000	6	31 (in 24 towns)
40,000	40,000	13	17 (in 17 towns)
5,000	50,000	50	12 (in 2 cities)
15,000	36,500	60	22 (in 16 towns)

Plaintiff's Surrebuttal Evidence

JOHN J. BEALL,

called as a witness by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cook:

Q. I hand you Defendant's Exhibit "A-17", and I will ask you to examine it. Are those cessions of insurance to the Union made by the Northwestern? A. They seem to be.

Q. And in each case do they cede to the Union insurance in excess of the \$25,000.00 limit provided in Article 8 of the treaty?

A. I think they do not. Those I have seen so far do not. Here is one in excess of \$25,000.00 (indicating).

Mr. Dumett: What is the number of that?

The Witness: That is No. 12505.

Q. (By Mr. Cook) And that cedes to the Union \$40,000.00 worth, is that right?

A. That is right.

Q. And the Northwestern retains identical \$40,000.00, according to that cession?

A. That is right,—and \$61,000.00 on the stock.

Q. Does that cession of \$40,000.00 cover more than one individual risk? A. Yes.

Q. How is the Union advised by that cession that that \$40,000.00 ceded to them, which is in excess of the \$25,000.00 limit, [220] covers more than one individual risk?

(Testimony of John J. Beall.)

A. By a P.M.L. showing of 13%.

Q. Can you explain that in any other way or any more fully to the Court?

A. I am not sure I understand the question, but——

The Court: Can you make it plainer, Mr. Cook?

Q. (By Mr. Cook) I would like to have you explain, if you can, more fully how your estimated 13% P.M.L. on that report 12505, Exhibit A-17, notified the Union Mutual that more than one risk is involved in this cession of \$40,000.00?

A. The underwriters who passed on this particular policy submitted the maps and the reports and reached the conclusion not more than 13% of the total values covered were concentrated in a single area.

The Court: In what?

The Witness: In one fire area.

Q. (by Mr. Cook) That appears to be the only one of those many dailies which involves a cession of more than the \$25,000.00 limit, is that correct?

A. Yes, sir. From a hurried look at it.

Q. If you will refer to cession No. 10024, which is the second sheet of that Exhibit A-17, I notice some values placed after description of specific property. What is the purpose of that?

A. It shows the limit of liability under our policy in each of those risks.

Q. Does that limit of liability in dollars there attributed to these various properties have anything to do with the reinsurance of individual risks?

(Testimony of John J. Beall.)

A. No, sir. It has in the whole study of the share of values concentrated in a single risk. Two of the risks might be in the same fire area. [221]

Q. In all of those sheets comprising Exhibit A-17 is there any other method used by the Northwestern in designating the number of risks involved? A. No.

Q. Than by the use of the P.M.L. A. No.

Q. How many years have you and the Union done business under a treaty similar to this?

A. The contract was arranged in 1925. I am pretty sure of that.

Q. That is a matter of some 17 years?

A. Yes, sir.

Q. During the course of those 17 years has the Northwestern ever used any other method than by using the P.M.L. estimate to advise the Union of the number of risks involved?

A. Never any other method.

The Court: Never any other method than what method?

The Witness: Than the P.M.L. estimate.

Q. (By Mr. Cook) During those 17 years did the Union Mutual ever use any other method of advising Northwestern of the number of risks involved on business ceded to the Northwestern than the P.M.L. estimate? A. Never.

Mr. Dumett: I again object to that as not being proper surrebuttal, having been gone into fully in their case in chief, and having no relation to any new matter brought out by us.

(Testimony of John J. Beall.)

The Court: The objection is overruled.

Q. (By Mr. Cook) Your answer is what?

A. My answer is never.

Mr. Cook: That is all.

Cross Examination [222]

By Mr. Dumett:

Q. Now with respect to Daily Report 12505 in Exhibit A-17, that particular Daily Report which you referred to covers, does it not, seventeen different towns and villages?

A. That seems to be the number.

Q: About seventeen different towns and villages located where?

A. At various places in the State of Washington.

Q. And that is a certificate of reinsurance that cedes how much? A. \$40,000.00.

Q. Is it not correct to say that where you have a certificate covering properties in seventeen different towns that there are seventeen different risks involvd?

A. It certainly is highly likely.

Q. And if there were seventeen different risks involved and if the probable maximum loss was the method used to designate the number of risks, the percentage should be 5.7, should it not, instead of 13%?

A. Not at all. The values would not be the same in each case. You might have seventeen different locations in a 99% P.M.L., if 99% of your values were in the same area.

(Testimony of John J. Beall.)

Q. But if you had seventeen different risks, seventeen divided into one hundred would be 5.7?

A. I haven't made the calculation.

Q. I think it is roughly that. And if P.M.L. is the term used to designate the number of risks, and assuming that I am right, that 5.7 is the decimal equivalent of 117, why would you not say it was 5.7 instead of 13?

A. The percentage of the number of risks has no particular bearing.

Q. Then why do you not follow the custom if you are trying to indicate by P.M.L. to your reinsurer the number of risks, why [223] do you not follow the custom of simply stating in your daily report there are seventeen risks? Would it not be simpler?

A. The other is the time hallowed custom.

Q. But would it not be simpler and clearer if you would say, instead of using this method, there are seventeen risks, to your reinsurer?

A. I don't think so.

Q. Or if you had a structure where there might be some question whether it involved one risk or two risks, would it not be simpler and clearer to state on the daily report two risks?

A. The percentage is so simple. We say 50% and 50% or 50% is \$25,000.00. It is simple.

Q. Take 9108 you have there. You give the P.M.L. there of 33%?

A. Yes, sir. With seventeen risks.

(Testimony of John J. Beall.)

Q. And there you have seventeen different risks?

A. It would help if—may I speak?

Q. I would prefer that you answer my question. A. It might show 100.

Q. In 9442 the P.M.L. is 37%?

A. Yes, sir.

Q. And it covers eight separate items.

A. Not on my sheet. I have a blanket of buildings and contents.

Q. How many school buildings?

A. It doesn't show, unless it is on the back. Oh, here is an endorsement. I see it on the endorsement.

Q. The schedule shows eight different school buildings or items? A. That is right.

Q. And No. 10024 you show the P.M.L. of 22%?

A. That is right.

Q. And you have there twenty-six stated locations in twelve different towns? [224]

A. I haven't counted them. I will take your word for it.

Q. No. 10870 P.M.L. 26% .

A. That is right.

Q. And it covers 22 items in at least sixteen towns? A. I haven't counted them.

Q. Is that approximately correct?

A. That is probably right.

Q. And turn to 13486, the last one.

A. Yes, sir.

Q. P.M.L. 60%?

(Testimony of John J. Beall.)

A. It is indistinct here, but I think that is what it was.

Q. It covers there 21 locations in 16 towns?

A. I have 22 items.

Q. Is there a schedule there showing the items?

A. There is a schedule.

Q. Of course where you have a schedule attached to a daily report that lists items in 17 different towns, that clearly, on the face of it, is an indication of the severability of risks, is it not?

A. Yes.

Q. And isn't that commonly done to have schedules attached to daily reports or certificates of reinsurance or bordereaus that show listing of the articles and also shows the number of risks?

A. That is not customary. If the form attached to our policy includes a schedule it goes on here, but if a form attached to our policy covers the policy blanket we put in the blanket, and that is the custom and usage. This is not for the purpose of informing the reinsurer of the P.M.L., but is a synopsis of the forms attached to the policy. It has a different purpose than the P.M.L. [225]

Mr. Dumett: I believe that is all.

Redirect Examination

By Mr. Cook:

Q. You wished to make some explanation on this P.M.L.?

A. That was an explanation that all of this below the line has no reference to the P.M.L. estimate. This is an estimate or synopsis attached to

(Testimony of John J. Beall.)

out policy, and is not information to the reinsuring company of the number of risks involved.

(Witness excused.)

FELIX F. KURZ,

called as a witness by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cook:

Q. State your name, please.

A. Felix F. Kurz.

Q. Where do you live, Mr. Kurz?

A. Seattle.

Q. What is your business? A. Insurance.

Q. With what particular company are you connected?

A. The General Insurance Company of America.

Q. How long have you been connected with the General Insurance Company of America?

A. Twenty years,—the life of the company.

Q. You were one of those who organized the company or you were there at that time?

A. I was there at the organization time. [226]

Q. What particular position do you hold now with the General? A. I am vice-president.

Q. And you have been vice-president for how long? A. About nine years.

Q. What duties do you have in connection with

(Testimony of Felix F. Kurz.)

your employment by the General Insurance Company of America with reinsurance contracts and treaties?

A. I handle and advise the making of contracts.

Q. Is it proper to say the reinsurance part of the General Insurance Company's work is under your supervision?

A. Yes, sir.

Q. How long has that been true?

A. About ten years.

Q. Will you tell the Court the meaning in the insurance world of one risk, when we speak of an individual risk, or one risk or two risks or three risks? [227]

Mr. Dumett: I wish to make an objection at this time. I respectfully submit to Your Honor this is going beyond the range of propriety on the part of the Plaintiff and is unduly lengthening this case.

All of these matters relating to definitions and custom and usage were gone into by them very fully and at length in their case in chief, and the only reason for the continuance of the trial was to permit us, after they had amended their pleadings, to bring this issue in to meet the testimony they had put on.

What Mr. Cook is attempting to do now with a new witness is to go into exactly the same matter he went into with three expert witnesses in this case, and I submit it is not now proper to re-open that and go into it with a new witness, because all those matters were thoroughly covered before. I think it is improper and I think the objection I make now is sound.

(Testimony of Felix F. Kurz.)

The Court: In view of the fact the objection goes to the Plaintiff's counsel at this time going into the same subject you went into in the deposition, and with the witness Towers, your objection is overruled. If the scope exceeds that I will hear from you further.

Mr. Cook: I do not intend to go beyond that.

[227A]

A. The term "Risk" is used in two cases in the insurance business. First from the standpoint of an agent presenting a risk to his company. He refers to a line of insurance which may be on one building or a group of buildings or a manufacturing plant, or it might be a schedule of buildings.

Then we use the term "risk" in another sense when we use it in reinsurance contracts, because we want to place a specific limitation of liability that we will accept from another company, and we use the term "risk" in a narrower sense as the amount subject to one loss.

Q. (By Mr. Cook) What part has the term "P.M.L.", as used in the insurance world, to do in determining the number of risks involved in reinsurance cessions?

Mr. Dumett: I make the same objection, and may it be understood—I don't want to break in unduly—but may I [227B] have an objection to all these questions, on the ground that they are not proper sur-surrebuttal and were all covered in the case in chief? As to any new matters I may have

(Testimony of Felix F. Kurz.)

brought out, that is something else, but this would cover it.

The Court: The objection is overruled. Do you consent that counsel have this arrangement?

Mr. Cook: Yes, Your Honor; that is agreeable to me.

The Court: The Court consents to that. You may proceed.

A. In reinsurance contracts or in the exchange of reinsurance, it is usual to refer to risk as the amount subject to one loss.

Q. I will re-ask the question. Can you give any examples of what constitutes one, two or three risks, as used in reinsurance treaties, before we go into the next phase?

Mr. Dumett: That is objected to as going beyond the scope of the issue here.

The Court: Overruled.

A. An individual frame dwelling, for example, would be a risk. I am using the term "risk" from a reinsurance standpoint.

If we cover two such dwellings and they were ten feet apart, and without much or any public protection, they might still be one risk.

As the distance between those dwellings increases the judgment of the underwriter enters into it, at what point the one risk becomes two risks.

Q. (By Mr. Cook) Is it possible or usual to have more than one risk in the same structure?

A. Yes; it is possible—not usual, because it de-

(Testimony of Felix F. Kurz.)

pende on the type of construction and the type of the risk.

Q. Can you give us some example where there would be more than one risk in the same individual structure?

A. The example Mr. Towers gave this morning I think is a good [228] example—a 44-story fire-proof building would be a multiple risk. As to how many units would depend upon the judgment of the individual underwriter.

Q. Incidentally, did the General Insurance Company also have some insurance on the Tacoma Narrows Bridge? A. Yes.

Q. Will you tell me what the General wrote the Tacoma Narrows Bridge at?

Mr. Dumett: That is objected to as not within the proper scope. That is going into a collateral issue and trying to go into some other case, how it was treated, and why it was so treated is beyond the scope of the sur-surrebuttal.

The Court: The objection is overruled.

A. The number of bridges in the country is on the whole limited, as far as large structures are concerned, and consequently the judgment of the underwriters is not perhaps as mature as it would be in other fields.

This particular bridge was submitted to our company and it was carefully reviewed, and it was our opinion it was some approximately 50% subject, and our net retention was predicated on that basis.

(Testimony of Felix F. Kurz.)

After the collapse, because of that experience, we have changed our ideas, but that was our sincere opinion.

Q. (By Mr. Cook) You have used the term "50% subject." Is that synonymous with 50% P.M.L.?

A. Yes, sir. We use it in our company in the same manner the Northwestern apparently uses the term P.M.L.

Q. 50% subject and 50% P.M.L. mean the same thing? A. Yes, sir.

Mr. Dumett: You mean in the practice?

The Witness: Yes, sir; and with many companies with whom [229] we deal. I think stock companies use the term subject, or the Mutuals use the term P.M.L.

Q. (By Mr. Cook) Referring to this bridge as being 50% subject, or having a 50% P.M.L., what would that indicate in the insurance world as to the number of risks involved?

A. We were thinking of that as two risks—as we saw the probable maximum loss was 50%.

Mr. Kurz, I hand to you here Defendant's Exhibit A-2, which is a photostatic copy of a telegram from Northwestern to Union, which reads: (Reading)

"Please refer our letter May 31, Washington Toll Bridge Authority contract, Tacoma Narrows Bridge. Further information just received indicates P.M.L. about 50%. We will

(Testimony of Felix F. Kurz.)

retain \$50,000.00. Please wire your authorization."

Considering that telegram and P.M.L. estimate, what in the insurance world would that indicate to the Union as to the number of risks involved?

Mr. Dumett: I object to the form of that question. May I ask some questions on voir dire to see if he is qualified to answer?

The Court: Yes; you may do so.

Cross Examination

By Mr. Dumett:

Q. Counsel read from the wire and asked what that would mean in the insurance world. I understood you to testify a moment ago what your practice was. Do you know of a uniform custom in the insurance world that would bear on the interpretation that the Union and other companies would place upon a term of that kind? Have you the facts to answer that question of your own knowledge?

A. I have been in this business twenty-five years, and for twenty [230] years I have been an underwriter, and I would say that an underwriter who has had even a few years experience would immediately consider the amount subject, when it was so indicated, either the amount subject or P.M.L., as indicating what was the probable maximum loss, and consequently it indicates the unit or risk subject to the particular hazard.

(Testimony of Felix F. Kurz.)

Mr. Dumett: That is all on voir dire.

The Court: The objection is overruled.

Direct Examination (Resumed)

By Mr. Cook:

Q. Will you now answer the question I asked you, what information this would convey, using the accepted term—the accepted meaning of the terms in the insurance world as to the number of risks in this certificate?

A. It would indicate to an underwriter there were two risks.

Q. And handing you Defendant's Exhibit A-5, which is a photostatic copy of the actual cession or daily, will you state whether or not that also would give the same indication as Defendant's Exhibit A-2, about which you have just testified?

A. The daily report indicates P.M.L. 50%, and it would give the same interpretation or impression.

Q. That there were two risks involved?

A. Yes; that there were two risks involved.

Q. May I ask you this one general question? Can you tell us what the practice is in the insurance world in general, among companies, of the manner and how they indicate to their reinsurers the number of risks involved?

A. By giving either the amount subject or the P.M.L., to the best of my knowledge.

The Court: By that alternative phrase you mean the same idea? [231]

The Witness: Yes, sir.

Mr. Cook: That is all.

(Testimony of Felix F. Kurz.)

Cross Examination

By Mr. Dumett:

Q. Is it not also common practice for reinsured companies to advise their reinsurers of the number of risks involved by schedules, which would show on their face the severability of the risks, such as properties in various towns?

A. Not necessarily. We write lots of insurance where we declare the reinsurance simply stating various towns or locations in Washington, or various locations in the United States. It might mean three or one hundred locations. We don't designate the number.

Q. The question is not whether it is necessarily done, but it is done?

A. It might be done, but it is not customarily done, to the best of my knowledge.

Q. You have seen it done, however?

A. Yes. Although where I have seen it done it is usually incidental, because no underwriter cares to know the number of risks without knowing the probable amount subject.

Q. Handing you Plaintiff's Exhibit No. 2 for identification, one of the exhibits in this case, Mr. Kurz, a certificate of reinsurance from Union to Northwestern, with schedule attached, that schedule shows, does it not, properties in various locations in certain southern states?

A. Yes, sir; it does. This is a general form or schedule.

(Testimony of Felix F. Kurz.)

Q. Is that commonly used, that kind of a schedule, or frequently used?

A. It is used where the company ceding the re-insurance gives the accepting company, you might say, a copy of the form or a [232] summary of the form.

Q. Showing the various risks?

A. That is right.

Q. Of course it is apparent, is it not, even though you have not seen this before, from that schedule there are a number of separate and distinct risks—properties in separate towns? A. Yes, sir.

Q. And you have seen that done on other occasions, have you not, with respect to large numbers of risks involved in a particular coverage?

A. Yes, sir; I have.

Q. Is that information as to number of risks also sometimes given in what are called bordereaux?

A. I have never seen it.

Q. In your experience you have never seen it?

A. Not in bordereaux.

Q. Have you ever seen the number of risks shown directly or indirectly in bordereaux at any time?

A. No, sir; I haven't. The purpose of a bordereaux is to make it as brief as possible and to summarize things as much as possible, and I don't recall I have ever seen that in a bordereaux.

Q. It would be possible, would it not, to have a one-story building of combustible material with no

(Testimony of Felix F. Kurz.)

firewall or fire stop, yet where the area of the building and other conditions were such that you would show less than 100% P.M.L.?

A. Not without fire stops.

Q. Is it not possible even without fire stops with a building spread over a large area, such as I have described, to have a P.M.L. of less than 100%?

A. No, sir. Not a building of combustible construction.

Q. The only one-story building you know of with regard to the [233] area where you could have less than 100% P.M.L. would be where you have fire stops? A. Yes, sir.

Q. What kind of fire stops?

A. A fire stop would have to be a brick wall with no openings or if there were openings they would have to be protected by standard fire doors.

Q. A very large building, spread over a large area, would not that in itself, in your experience, justify rating it as less than 100% P.M.L.?

A. No, sir; because the larger the area the greater the hazard.

Q. Say a large area spread out, a one-story building, even with no fire stops, is it not less likely that building will be totally destroyed by one hazard than would a much smaller building?

A. No, sir; that is not so. In fact with such a building, it would add to the rate, because of the large area.

Q. Your definition of one risk was amount subject to one loss? A. That is right.

(Testimony of Felix F. Kurz.)

Q. Amount subject to one loss. Now the Tacoma Narrows Bridge, do I understand you that you consider it involved more than one risk?

A. Yes, sir; we did.

Q. And your company had a million dollars on the bridge? A. A million dollars gross.

Q. Do you know the Hartford wrote about \$100,000.00 gross on it?

A. I don't recall what the other companies had.

Q. Assume I am right, the Hartford is a much larger company than the General?

A. Yes, sir.

Q. Would that not indicate to you a company like the Hartford [234] considered it as one risk or considered it quite a hazardous risk?

A. Not necessarily. It might.

Q. When you say your company considered this Tacoma Narrows Bridge as two risks, do you mean you considered the bridge itself as two risks?

A. Yes, sir.

Q. This Tacoma Narrows Bridge, across the Tacoma Narrows, was a suspension bridge?

A. Yes, sir.

Q. You considered it as two risks. Do you mean you considered it in the same category you would consider two separate buildings far removed from one another, so one would not be involved in a hazard to the other?

A. Well, practically so, yes. In fact we perhaps made a little allowance for the fact it was one

(Testimony of Felix F. Kurz.)

structure, and consequently we were liberal when we estimated 50%.

Q. You say in estimating it at 50%, what do you mean by that?

A. Actually when we have a component unit of the same structure, as for example this bridge, or a fireproof building, we do not divide it down quite as finely as we would if each of those units was distinctly and definitely separated.

In this case the bridge had several piers, it had approaches, it was supported by cables, and at the time we underwrote that bridge we thought at the very most 50% would represent the maximum loss.

Q. Wasn't it your opinion that no matter what hazard or catastrophe occurred that the bridge would not be totally destroyed, but the worst that would happen to it it would be 50% destroyed?

A. Yes, sir.

Q. Wasn't that really an estimate of the probability of the amount [235] of loss in the event of any storm hazard? A. Yes.

Q. (By Mr. Dumett) And in view of the nature of that bridge, a suspension bridge, with the bridge portion suspended through piers at either end—there were no midstream supports?

A. There were two piers.

Q. Two piers at either end? A. Yes, sir.

Q. And the bridge was suspended between the piers on cables? A. Yes, sir.

The Court: There were one or more piers in the middle of the stream. They stood there for months.

(Testimony of Felix F. Kurz.)

Mr. Dumett: You may be right, but anyway it was a suspension bridge, with the bridge proper suspended on cables through piers.

The Witness: On cables.

Q. (By Mr. Dumett) Supported by cables which were attached to the piers? A. Yes, sir.

Q. Is it not true in considering that bridge as the subject of insurance that the hazard from collapse of the bridge as a whole was not considered at all?

Mr. Cook: I object to that for this reason: That that goes to the quality of a man's judgment, which is no defense in this case. All we are called upon to do is to exercise our good judgment as to how many risks that bridge presents. This goes to whether we were right or wrong.

When Mr. Beall was on the stand he testified he thought it was two risks, and he was asked, "Experience shows you were wrong?", and he said, "No, I still think I was right, because the piers were still standing there after the collapse was [236] over, and still undamaged by the collapse."

Mr. Dumett: I will ask another question in its place. Can you, Mr. Kurz, tell us just what were the two separate risks involved, in your opinion, as an expert? Can you break down or segregate it?

The Witness: At the time we had the values submitted we had it broken down as to the values between the two piers and the approaches on either side and the value of the balance of the structures. The piers were very expensive, the installation cost being particularly high.

(Testimony of Felix F. Kurz.)

Q. (By Mr. Dumett) Is that as near as you can come to defining what separate units or risks there were in that structure as a whole?

A. Yes, sir; that is my recollection at the moment.

Q. And it was on that that you based the statement as to the two risks? A. Yes, sir.

Q. Although it was all one physical structure?

A. That is right.

(Witness excused.) [237]

Mr. Dumett: As Mr. Cook says, in accordance with our agreement which we stated before, we would have this testimony transcribed, like the other testimony was, at our joint expense, and a copy furnished the Court.

Thereupon both parties rested from the giving of evidence. Whereupon the case was continued to June 14, for the purpose of submission of briefs and oral argument at that time.

Be It Remembered, that heretofore and on to-wit June 22, 1943, at the hour of 10:00 a. m., the above entitled matter came on regularly for hearing on entry of Findings of Fact, Conclusions of Law and Judgment, before the Honorable John C. Bowen;

Plaintiff appearing by Jo D. Cook, Esq., (Messrs. Shank, Belt, Rode & Cook) its attorneys and counsel;

Defendant appearing by Ray Dumett, Esq., (Messrs. Bogle, Bogle & Gates) its attorneys and counsel.

Whereupon, the following proceedings were had:

[237A]

The Court: I would invite counsel to make known to the Court any points on which they are not in agreement on the propriety of the form of the Findings proposed by Defendant, that is, if there are any such disagreements, as to form.

Mr. Dumett: Yes, Your Honor. I understand Mr. Cook wishes to take up with Your Honor certain objections he has to the form. I don't know just what they are yet, but I presume he will have some.

It occurred to me, Your Honor, that it might be well, before we got in to that discussion, providing it meets with Your Honor's approval, for me to take up first the deposit and tender that I mentioned to Your Honor at the time I appeared in the Clerk's office, I think yesterday. I have advised Mr. Cook about it.

That deposit and tender I hand to the Court, the original. This was served upon opposing counsel on last Saturday morning, I think; and then in this instrument, in brief, what we do there, we say that, although we do not believe we are legally bound to do so, we do now tender and deposit in Court the sum of \$102.60 as a return premium to the Northwestern, on the theory that in view of

the Court's ruling, if the actual amount of the cession is treated as \$32,000 instead of \$50,000, out of an abundance of fairness, we wish to give them credit for any amount in excess of the premium that would have been the premium in the event the reinsurance had been ceded on the \$32,000 basis in the first place.

The reason I make this tender is that during the [238] early stages of the trial, counsel for the Plaintiff raised the point in questioning our witnesses as to whether we had offered to return any part of this premium.

I at that time stated that we had not because we would have to wait for the decision of the Court to determine on what basis the cession was really made; that if it was held that it was made on a \$32,000 basis or some other basis lower than \$50,000, although we felt no legal obligation to do it, yet, in order to eliminate any question about it, that they were entitled to any return premium, we are ready to tender it into Court. I have it on my person now.

The reason that I wish to tender it into Court is that I assume that the Plaintiff and counsel for the Plaintiff will be unwilling to accept it. Their whole theory, of course, is that the cession was on a \$50,000 basis and that they are not entitled to any return premium, and, as a matter of fact, as the record shows, they have given us a notice of no return premium due.

Of course, that is on the theory that there was \$50,000 cession, and I presume, in the event they

want to preserve their record for appeal, they would not voluntarily accept this. If they would, I would give it to Mr. Cook right now; but by tendering it into Court, they don't prejudice any rights they have, nor do I.

I had assumed, I may say,—

The Court (Interposing): What rule do you pro- [239] ceed under?

Mr. Dumett: Rule 67 of the Rules of Civil Procedure.

The Court: You may proceed.

Mr. Dumett: It had been my assumption that here, as in the State courts, this being a voluntary tender, that all I would have to do would be to deposit it with the Clerk; but the Clerk called my attention to the language in the rule, which I had overlooked, that it must be done with the leave of the Court, by leave of Court; and so it is for that reason that I am applying to Your Honor for leave of Court.

I would assume that there is nothing controversial in this particular matter; that if we choose to tender this amount, even though we believe we are not legally liable for it, but in order to remove any possible technicality from the case and leave only the main issue, I presume that there is no controversy and that the Court ordinarily would grant us leave to do that, providing it is done in a way that it does not prejudice or bind the Plaintiff.

The Plaintiff, in other words, doesn't accept it—I assume he won't—but it is tendered into Court for

his use so that, when this case is concluded, it is there.

The form of the tender, as the Court will note, it is a notice to the other party, that the amount is tendered, with authority and directions to the Clerk to hold it for the benefit of the Plaintiff and pay it over to Plaintiff if and when proper receipt is given; and I at this time would like to have the leave of the Court to make that deposit, which I am ready to make now.

The Court: Mr. Cook, did you wish to oppose it or [240] make any statement concerning it?

Mr. Cook: Well, it is a matter over which, of course, I have absolutely no control, Your Honor.

My position would simply be this, that the Defendant cannot, after the Court announces its decision, change its position any by now tendering money; that if any tender was necessary, it would have necessarily had to have been made when they discovered or first contended that their cession had been wrong, that they had been ceded only \$32,000 instead of \$50,000; and there was evidence introduced to the effect that no return had been made of the premium under their theory and no tender of it, and certainly Counsel can't wait until after a lawsuit is over and then tender it, if there is any liability or any right accruing under it.

It is something that I have no control over. I don't intend to waive any rights that I may have, and I proved in the case that no tender had been made of a return premium; and they, of course,

discovered what they contend now several months before the lawsuit was even started, and if a tender was necessary, it certainly should have been made at that time, not now, after decision has been reached in the case.

The Court: What response to that do you wish to make?

Mr. Dumett: In short, Mr. Cook's position, as I assumed it would be, is that he is not in a position, of course, on this sort of an application, to oppose the tender. That is, it is a matter between counsel for the Defendant and the Court, provided, of course, it is understood that he is not accepting it or waiving his rights, [241] and I do not intend to ask him to waive any rights.

The Court: Did you make any foundation in your pleading for this eventuality?

Mr. Dumett: Not in the pleading itself, Your Honor, which we considered then and consider now unnecessary. The suit itself was a suit by the Plaintiff for a definite amount of money which the Plaintiff claimed was the amount that the Defendant owed them by reason of Defendant's share of the loss of the bridge.

We answered, setting forth that the actual amount we owed for our share of the loss of the bridge was less than claimed, because of the cession not being in accordance with the treaty.

Therefore, the controversy in this case was whether our share of the loss on the bridge was the amount the Plaintiff said or what we said. That was the sole controversy. So there was no occasion

in the pleadings to go into this matter at all. In other words, the Plaintiff did not sue or ask for any return premium.

But, however, and as I say, it is my view that there is no obligation on our part at all to pay a return premium. At least, in this case, it wasn't in issue. However, now that the Court has held that the basis of the cession was \$32,000, I would like it to appear of record that, even though we recognize no legal liability, we want to be more than fair on the matter; and rather than wait until the matter is finally concluded, either after appeal or by acceptance of the Court's judgment, we would like to make the tender now and make it here so it will be a matter of record. [242]

Then, if and when this case is concluded, either by the Plaintiff's accepting the Court's judgment or appealing and having it affirmed, if that were the case, that money would be there available for the Plaintiff.

Under the treaty, there is no provision at all for a return of any premium in the event of a case like this. Article XIV of that treaty says that, where the net retention is improperly stated, where they state they are retaining more than they actually did, that the sole remedy to be granted will be a reduction of the net retention under Article XIV.

In other words, there is a penalty on the Plaintiff when it misstates its true net retention, that penalty being a reduction of the amount of the cession to the actual amount without any allowance for return

premium at all. There is nothing in the treaty that says there shall be a return premium.

So it is our legal position that we are not liable for it. But in view of the fact that Plaintiff has raised it, and in order to eliminate any possible technicality, we wish to tender it.

Now, the first time we could tender it, since the Plaintiff was not asking for it and it was not involved in this suit, was after the Court had held what in his opinion the actual net retention was; and it is for that reason that we are making the tender.

I submit that it is eminently proper, it does not prejudice any of the Plaintiff's rights, but it is, we feel, important for our record to show that it was tendered after the amount of the net retention was determined.

The Court: The Court's permission is granted to file this tender and deposit in the Registry of the Court.

Mr. Dumett: Thank you, Your Honor. I will do so right after this hearing. [243]

Copy received Sept. 10, 1943.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed Sept. 10, 1943.

[Endorsed]: No. 10584. United States Circuit Court of Appeals for the Ninth Circuit. Northwestern Mutual Fire Association, a corporation, Appellant, vs. Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 18, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals,
for the Ninth District

No. 10584

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation,

Plaintiff,

vs.

UNION MUTUAL FIRE INSURANCE COM-
PANY OF PROVIDENCE, RHODE IS-
LAND, a corporation,

Defendant.

STATEMENT BY APPELLANT OF POINTS
ON WHICH IT INTENDS TO RELY

Comes now the Northwestern Mutual Fire Association, the above named Plaintiff and Appellant, and makes this statement of the points on which it intends to rely on the appeal herein:

1. The evidence as introduced in this case shows as a matter of law that the Defendant at all times knew that the Plaintiff had the catastrophe excess insurance which it had.

2. The evidence as introduced in this case shows as a matter of law that there was no risk (as such term is understood among insurance men in general) involved in the insurance of the Tacoma Narrows Bridge, at issue in this case, greater than fifty per cent of such insurance, and such fact was duly communicated to the Defendant.

3. The evidence as introduced in this case shows

as a matter of law that according to the universal custom and usage in the reinsurance business, excess catastrophe insurance such as it appears herein that the Plaintiff had, is never taken into account in computing the net retention of the reinsured.

4. Full premium for \$50,000.00 of reinsurance had been paid by Plaintiff to Defendant and, prior to judgment herein, no payment or tender of payment had been made by Defendant to Plaintiff on account of any reduction of such reinsurance.

5. Under the evidence in this case the trial court should have found for the Plaintiff and entered judgment in its favor as prayed in the amended complaint.

SHANK, BELT, RODE & COOK,
JO D. COOK,

Attorneys for Plaintiff and Ap-
pellant.

Copy received Oct. 12, 1943.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed Oct. 18, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND APPLICATION RE-
GARDING ORIGINAL EXHIBITS

The parties hereto by their undersigned attorneys of record herein stipulate and request that this Court enter an order herein relieving the parties from printing or reproducing in the printed

record on appeal herein the following exhibits, the originals of which have been transmitted to this Court by order of the United States District Court herein, namely: Defendant's Exhibits A-14, A-15 and A-16; and the parties further stipulate and request that this Court in said order provide that said exhibits shall be considered by this Court in their original form, without reproduction, and as though set out in the printed record.

The reasons for not printing or reproducing said original exhibits are as follows:

Defendant's Exhibit A-14 is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1938, made by examiners from insurance departments of the States of Washington, North Carolina, Georgia and Oregon.

Defendant's Exhibit A-15 is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1939, made by the Department of Insurance of the State of Washington.

Defendant's Exhibit A-16 is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period

ending December 31, 1940, made by the Department of Insurance of the State of Washington.

On September 29, 1943, the District Court of the United States for the Western District of Washington, Northern Division, upon application of the Appellee, entered an order herein stating that the court was of the opinion that said original exhibits should be sent to the appellate court, in lieu of copies, and directing the Clerk of said District Court to transmit said exhibits in their original form to the United States Circuit Court of Appeals for the Ninth Circuit.

The Appellee's purpose in introducing said exhibits in evidence was a negative one, namely, to show that these exhibits did not contain certain information regarding reinsurance. In view of the lengthy nature of each of these exhibits, it is the judgment of the parties hereto, that it is both impractical and unnecessary to print or reproduce these exhibits, containing as they do a large amount of statistical information merely for the purpose of showing what they do not contain.

It is stipulated and agreed that the only reference to reinsurance in Defendant's Exhibit A-14 is the following:

“Reinsurance

The reinsurance department performs a very important function. The acceptance of large risks made it necessary for the Association to execute reinsurance treaties to protect it beyond its net carrying capacity. This additional carrying capacity is effected through contracts

with other mutual organizations in the United States and Canada covering the cessions of pro-rata quota share and excess coverage. The domestic facilities are supplemented by a contract with C. T. Bowring & Co., London, England, agents for underwriters at Lloyd's, London."

It is stipulated and agreed that the only reference to reinsurance in Defendant's Exhibit A-15 is the following:

"Reinsurance

The Association's reinsurance facilities appear to be adequate to meet all its requirements, having reinsurance treaties with a number of mutual organizations in the United States and Canada covering the cessions of pro rata, quota share and excess coverage. These reinsurance facilities are supplemented by a contract with C. T. Bowring and Company, London, England, agents for underwriters at Lloyd's, London."

It is stipulated and agreed that the only reference to reinsurance in Defendant's Exhibit A-16 is the following:

"Reinsurance

The Association's reinsurance facilities appear to be adequate to meet all its requirements, having reinsurance treaties with a number of mutual organizations in the United States and Canada covering the cessions of pro rata quota share and excess coverage. These reinsurance facilities are supplemented by a

contract with C. T. Bowring and Company,
London, England, agents for underwriters at
Lloyd's, London."

It is further stipulated and agreed that this
Stipulation and Application may be printed in the
printed record on appeal herein, in lieu of printing
said original exhibits.

Respectfully submitted.

BOGLE, BOGLE & GATES,
RAY DUMETT,

Attorneys for Appellee.

SHANK, BELT, RODE &
COOK,

JO D. COOK,

Attorneys for Appellant.

So Ordered:

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT IN SUPPORT OF STIPULATION
AND APPLICATION REGARDING ORIG-
INAL EXHIBITS

United States of America,
State of Washington,
County of King—ss.

Ray Dumett, being first duly sworn, upon oath
deposes and says:

That he is one of the attorneys of record herein
for the above-named Appellee, Union Mutual Fire

Insurance Company, of Providence, Rhode Island, a corporation.

That affiant makes this affidavit in support of the within and foregoing Stipulation and Application Regarding Original Exhibits. That affiant has read said Stipulation and Application and all of the facts stated therein are true to affiant's knowledge.

That Defendant's Exhibit A-14 herein is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the original official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1938, made by examiners from the insurance departments of the States of Washington, North Carolina, Georgia and Oregon.

That Defendant's Exhibit A-15 herein is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the original official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1939, made by the Department of Insurance of the State of Washington.

That Defendant's Exhibit A-16 herein is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the original official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1940, made by the Department of Insurance of the State of Washington.

That each of said exhibits is a lengthy document

containing a large amount of statistical information.

That on September 29, 1943, the District Court of the United States for the Western District of Washington, Northern Division, upon application of the Appellee, entered an order stating that the court was of the opinion that said original exhibits should be sent to the appellate court, in lieu of copies, and directing the Clerk of said Court to transmit Defendant's Exhibits A-14, A-15 and A-16 in their original form to the United States Circuit Court of Appeals for the Ninth Circuit.

That the Appellee's purpose in introducing said exhibits in evidence was purely a negative one, namely, to rebut certain testimony previously introduced in the case by showing that these exhibits did not contain certain information regarding re-insurance. That in view of the lengthy nature of each of these exhibits, it is the judgment of the parties hereto that it is both impractical and unnecessary to print or reproduce these exhibits merely for the purpose of showing what they do not contain.

RAY DUMETT.

Subscribed and sworn to before me this 20th day of October, 1943.

[Seal] C. F. OSBORN,

Notary Public in and for the State of Washington,
residing at Seattle.

My commission expires July 22, 1946.

[Endorsed]: Filed Oct. 22, 1943. Paul P. O'Brien, Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWESTERN MUTUAL FIRE ASSOCIATION,
a corporation, *Appellant,*

vs.

UNION MUTUAL FIRE INSURANCE COMPANY
OF PROVIDENCE, RHODE ISLAND, a
corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

CORWIN S. SHANK,
Jo D. Cook,
H. C. BELT,
SHANK, BELT, RODE & COOK,
Counsel for Appellant.

1401 Joseph Vance Building,
Seattle 1, Washington.

FILED

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWESTERN MUTUAL FIRE ASSOCIATION,
a corporation, *Appellant,*

vs.

UNION MUTUAL FIRE INSURANCE COMPANY
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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NORTHWESTERN MUTUAL FIRE
ASSOCIATION, a corporation,

Appellant,

vs.

UNION MUTUAL FIRE INSURANCE COM-
PANY OF PROVIDENCE, RHODE ISLAND,
a corporation,

Appellee.

No. 10584

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

**(b) JURISDICTION OF THE DISTRICT COURT AND
THIS COURT**

This action was begun by the filing of a complaint in the Superior Court of King County, Washington (Tr. 2), wherein the appellant Northwestern Mutual Fire Association, a corporation under the laws of the State of Washington, was plaintiff, and the appellee Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation of the State of Rhode Island, was defendant, to recover the sum of \$40,148.72, besides interest and costs. The appellee duly filed a petition for removal to the District Court

of the United States for the Western District of Washington, Northern Division (Tr. 15), and a bond for such removal (Tr. 19), and after due proceedings were had, the said Superior Court duly entered its order on removal (Tr. 23).

On June 22, 1943, the said United States District Court entered judgment and decree in favor of the appellee (Tr. 80) and appeal was taken therefrom by the appellant by notice of appeal and cost bond on appeal duly filed on September 9, 1943 (Tr. 82).

The statutory provisions believed to sustain the jurisdiction of the District Court are Judicial Code §24(1) and §28, U.S.C. Title 28, §41(1) and §71. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code §128, 28 U.S.C. §225, and C. 14, §1 of Act of Jan. 31, 1928, 45 Stat. 54, U.S.C.A., §861(a).

(c) STATEMENT OF THE CASE

The amended complaint (Tr. 27) states that on January 1, 1940, the appellant and appellee entered into a certain reinsurance agreement which is set out in full beginning at Tr. 28. Under Article I of this contract, the appellant (called the reinsured company) agreed to cede reinsurance to the appellee (called the reinsuring company) and the appellee agreed to accept such reinsurance (Tr. 28). This contract does not explain clearly the method of this ceding, but it appears in the evidence that this ceding was done by the sending by the appellant to the appellee of "certificates of reinsurance" upon forms such as are set out in defendant's Exhibit "A-5" (Tr.

94) and plaintiff's Exhibit "3" (Tr. 217). The amended complaint further states (Tr. 40) that during the year 1940 the Washington Toll Bridge Authority was constructing a single span suspension bridge across the Tacoma Narrows, said bridge being known as the Tacoma Narrows Bridge, and the appellant, in the early part of June, 1940, had notified the appellee thereof and requested that the appellee would inform the appellant how much reinsurance it was prepared to accept from the appellant. The amended complaint further states that on June 10, 1940, the appellant sent to the appellee a telegram (Tr. 40) regarding this matter, which contained the statement: "Further information just received indicated PML about 50%. We will retain \$50,000."

The amended complaint further states that the appellee in reply notified the appellant that it would accept \$50,000 of reinsurance (Tr. 41), that the appellant also received similar acceptances from other insurance companies in the aggregate sum of \$250,000 (Tr. 41) and that, relying upon such acceptances the appellant issued to the Washington Toll Bridge Authority its policy of insurance in the sum of \$350,000 and thereafter sent to the appellee its notification that it had ceded to the appellee \$50,000 of reinsurance upon its said \$350,000 of insurance. The meaning of this "cession of reinsurance" is that if the "reinsured" (the appellant) should suffer a loss on its \$350,000 policy of "primary insurance" then the "reinsurer" (the appellee) would reimburse the appellant to the extent of 50,000/350,000 (or one-seventh) of the appellant's loss and adjustment expenses. Such a

“cession of reinsurance” was referred to on the trial of this case by the witnesses variously as “pro rata,” “contributing” or “specific” reinsurance.

The amended complaint further states (Tr. 42) that a loss was sustained upon the appellee’s policy of insurance in the sum of \$269,230.78, that the appellant paid an adjustment expense of \$11,810.20, and that the proper share of such loss which the appellee should pay to the appellant was the sum of \$38,461.54, together with \$1,687.18, the appellee’s share of the adjustment expenses.

The amended answer of the appellee to the amended complaint (Tr. 58) admitted generally all of the allegations of fact contained in the amended complaint, which we have recited, excepting the conclusion of the proper amount of the appellee’s indebtedness to the appellant and set up a second affirmative defense, which was as follows (Tr. 61):

The appellee first referred to Article VIII of the reinsurance agreement set out in the amended complaint, the parts of which material to this controversy are as follows:

“Cessions hereunder shall in no case and at no time on one risk exceed \$25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company; except in specific cases subject to the approval of the reinsuring company; *provided, (1) the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company.*” (Tr. 32). (Italics ours).

After referring to Article VIII of the reinsurance agreement the appellee alleged

“That the plaintiff in making said cession represented to the defendant that it was retaining \$50,000.00 net of said insurance, as provided in said Article. That, relying upon the terms of said Reinsurance Agreement and believing and relying upon said representation of the plaintiff, the defendant approved said cession of \$50,000. That at the time said cession was made the plaintiff, contrary to its said representation and in violation of said Article VIII and without notifying the defendant thereof, reinsured all but \$32,000.00 of the total insurance of \$350,000.00 covered by plaintiff’s said policy No. 614-3652, mentioned in paragraph V of the amended complaint herein; and the amount of said insurance then, and at all times thereafter, retained net by the plaintiff, without reinsurance, at its own risk and liability under Article VIII of said Reinsurance Agreement was only \$32,000.00; whereas under the terms of said Article VIII the plaintiff, in ceding said \$50,000.00 of reinsurance to the defendant, was required to retain net at all times, without reinsurance, at its own risk and liability, an amount not less than \$50,000.00 of said insurance. That the defendant had no notice or knowledge of the plaintiff’s said violation of Article VIII of said Reinsurance Agreement, or of the plaintiff’s failure to comply with its said representation, until a date subsequent to the loss of the Tacoma Narrows Bridge, to-wit, on or about October 1, 1941.” (Tr. 62, 63).

On account of the facts above alleged, the appellee

invoked the provisions of Article XIV of the reinsurance agreement, which reads as follows (Tr. 63):

“If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with.”

On this account, the appellee claimed that it owed to the appellant the sum of \$26,897.55, which it tendered. Finding 15, made by the court (Tr. 77) states that this tender was paid by the appellee to the appellant and accepted by the appellant under stipulation that such payment was made and accepted without prejudice to or waiver of the claim of either party as to the balance of appellant's claim.

Upon the trial of this case, the appellee sought to prove its allegation in its amended answer which we have above quoted by introducing in evidence plaintiff's Exhibit “1” (Tr. 197). This exhibit is what was referred to throughout the trial as a “catastrophe excess reinsurance” issued by agents for Lloyds, wherein certain underwriting members of Lloyds reinsured the appellant applying “blanket to all hazards written by the Reinsured company (liability assumed under excess reinsurance contracts excluded) on property wherever located in the United States of America and/or Dominion of Canada” (Tr. 204).

Paragraph 4 of this policy provided as follows (Tr. 204) :

“4. The reinsurers are not liable for any loss or damage unless the Reinsured Company has paid or has become liable for a nett amount in excess of Thirty Thousand Dollars in any one loss, and then only for 90% of the amount of such loss or damage in excess of Thirty Thousand Dollars but in no event to exceed Two Hundred Thousand Dollars.”

Paragraph 6 of this policy provided as follows (Tr. 205) :

“The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate nett loss of the Reinsured Company on its nett retained lines only.”

In plain language, this policy means that if the appellant should suffer a loss from one cause, and the aggregate of all its losses on its net retentions should exceed \$30,000, the reinsurers would reimburse the appellant to the extent of 90% of the excess of such loss over \$30,000 up to a maximum loss of \$200,000. *This loss was not limited to one property or one policy of insurance but extended “blanket” over the entire business of the appellant.*

During the progress of the trial, counsel for the appellant asked its first witness:

“What, in insurance language, is meant by the term ‘net retention’ or, as in this contract, an amount retained net without reinsurance at its own risk and liability on one specific property?” (Tr. 164).

Upon objections being made to this question by coun-

sel for appellee, by permission of the court, counsel for appellant amended its amended complaint by additionally alleging as Paragraph X thereof the following:

"That under the usages and customs of the insurance business and in the insurance world the term 'net retention' or the term 'amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company,' does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention." (Tr. 165)

Thereupon, the court permitted the appellant to submit evidence proving such a usage (Tr. 168) and the trial was continued from December 30, 1942, to April 20, 1943 (Tr. 240), for the purpose of giving the appellee opportunity to meet the appellant's evidence.

At the close of the case, the trial court announced its decision in favor of the appellee and thereafter entered findings of fact and conclusions of law (Tr. 66). Findings of fact I to VII and IX to XI are merely a recital either of facts which were alleged and admitted in the pleadings, or of evidence about which there is no question. The findings of fact, which the appellant claims are erroneous and which, under the testimony in this case, are really conclusions of law, are as follows (Tr. 74-79):

VIII.

"That the plaintiff's statement in its said wire of June 10, 1940, that it would retain \$50,000,

and the plaintiff's statement in said daily report No. 10852 that it was retaining 'identical \$50,000,' constituted warranties to the defendant that the plaintiff was retaining under Article VIII of said treaty, \$50,000 net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the said reinsuring company. That the defendant, believing and relying upon the plaintiff's said warranties as it was justified in doing, authorized and approved said cession of \$50,000. That said cession by the plaintiff to the defendant was a cession of \$50,000 of reinsurance upon the Tacoma Narrows Bridge and approaches as one unit and risk, the single-risk maximum of \$25,000, designated by Article VIII of said treaty, being increased to \$50,000 by the above mentioned specific authorization and approval of the defendant, pursuant to and in accordance with the provision of Article VIII of said treaty permitting this to be done in specific cases subject to the approval of the defendant. That the court finds that said reinsurance was not ceded to the defendant upon a two-risk or multiple-risk basis, but, on the contrary, was ceded on a one-risk basis.

* * * *

XII.

"That the purpose of the net retention provision in Article VIII of said reinsurance treaty of January 1, 1940, is to assure the reinsurer that the ceding company will at all times have as much at stake, dollar for dollar, in the particular insurance as the reinsurer, since the reinsurer must depend upon the knowledge, judgment, diligence and good faith of the ceding company in investigating and appraising the risk, placing the

original insurance and making investigations and adjustments in the event of loss.

XIII.

“That, by virtue of the existence of said excess of loss reinsurance contract between the plaintiff and Lloyd’s (Plaintiff’s Exhibit 1), the maximum liability of the plaintiff in the event of any one loss to the Tacoma Narrows Bridge was \$32,000; and the actual amount retained net under Article VIII of said treaty by the plaintiff, without reinsurance at its own risk and liability on the same property so reinsured by the plaintiff with the defendant, was at all time \$32,000; and these facts were readily determinable by, and known to, the plaintiff at the time it made said cession to the defendant.

“That the plaintiff, in making said cession of \$50,000 of reinsurance to the defendant, owed to the defendant an obligation of the highest good faith to correctly compute and advise the defendant of the plaintiff’s actual net retention under Article VIII of said reinsurance treaty and to further advise the defendant of all relevant facts bearing upon said net retention and the nature of the risk. That the plaintiff did not inform the defendant, as it should have done, that its actual net retention was \$32,000, and not ‘identical \$50,000’ as represented and warranted to the defendant. That the defendant has been prejudiced by reason of said failure on the plaintiff’s part. That, in view of the plaintiff’s actual net retention of \$32,000, the plaintiff was without right or authority, under Article VIII of said treaty, to cede to the defendant more than \$32,000 of reinsurance on said bridge.

XIV.

"That said reinsurance treaty of January 1, 1940, between the plaintiff and the defendant provides in Article XIV as follows: 'Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with.' That the defendant was and is entitled to demand, as it did demand, that its liability with respect to such reinsurance be adjusted in accordance with the provisions of said Article XIV. That had the provision governing net retention in Article VIII of said treaty been complied with by the plaintiff, the defendant would have been ceded \$32,000 of reinsurance and would have been liable for its pro rata share of the loss, computed on the basis of a \$32,000 cession. That the court finds that the amount of defendant's liability to the plaintiff with respect to said reinsurance must be determined under the Article XIV on the basis of a \$32,000 cession.

XV.

"That the amount of defendant's actual liability to the plaintiff, computed in accordance with Article XIV of said reinsurance treaty, was \$25,624.31. That said amount, plus interest at 6% per annum to June 21, 1942, or a total amount of \$26,897.55, was tendered and paid by

the defendant to the plaintiff on June 20, 1942, and was accepted by the plaintiff on that date. That it was stipulated and agreed, however, by the parties hereto that said payment was made and accepted without prejudice to, or waiver of, the plaintiff's claim for any amount in excess of the sum so paid, and without prejudice to, or waiver of, the defendant's objection and defenses to the plaintiff's claim for any amount in excess of the sum so paid. That the plaintiff has been fully paid by the defendant all the plaintiff is entitled to receive from the defendant.

XVI.

extrinsic evidence
 " * * * That the court finds that the terms of Article VIII of said treaty of January 1, 1940, are plain, clear and unambiguous and do not permit of modification, amendment or interpretation by extrinsic evidence. That the court further finds that in any event, under the customs and usages of the insurance business and in the insurance world, the term 'amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company,' as used in Article VIII of said treaty, does not include and does apply to excess loss of reinsurance such as Plaintiff's Exhibit 1, and means what it says, namely: the amount retained net by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company after deducting all reinsurance, including excess of loss reinsurance such as Plaintiff's Exhibit 1.

XVII.

"That the plaintiff introduced testimony to

support its contention that the term P.M.L. (probably maximum loss), as used in its wire of June 10, 1940, and its daily report No. 10852, indicated two risks; and the defendant introduced testimony in rebuttal thereto. The court finds from a preponderance of the evidence that the contention of the plaintiff in this regard is not sustained, and further finds that said term did not and does not indicate two risks or a multiplicity of risks as applied to the facts and circumstances in this case."

Thereupon the court made a conclusion of law that the plaintiff was entitled to no recovery from the defendant (Tr. 79), and entered judgment accordingly (Tr. 80), from which this appeal is taken.

(d) SPECIFICATION OF ERRORS

We respectfully submit that the trial court erred in the following particulars:

1. In making its Finding of Fact VIII for the reason that the court throughout in this finding ignored the clearly and positively proven usage not to consider catastrophe excess insurance in computing "net retention," and also ignored the provision in the pleaded insurance agreement that the judgment of the appellant as to what constituted "one risk" *was to be binding on the appellee* and also ignored the clearly proven fact that "one risk" involved in this transaction as adjudged by the appellant was not greater than 50%, as expressed in the P.M.L.

2. In making its Finding of Fact XII for the reason that it should have recited that the purpose of the net retention provision therein mentioned as being to

assure the reinsurer that the ceding company would have at all times as much at stake as the reinsurer, was subject to the well-known and usual practice of all insurance companies in general and the appellant in particular to maintain catastrophe excess insurance as it had done.

3. In making its Finding of Fact XIII, for the reason that there is nothing in the contract or the evidence that justified the court in interpolating the words "in the event of any one loss" in this transaction but, on the contrary, the contract was made to cover *all* losses which might occur during the existence of the insurance, and for the further reason that in calculating that the liability of the plaintiff in the event of any one loss to the Tacoma Narrows Bridge was \$32,000 and that the actual amount retained net by the plaintiff was \$32,000, the court must have necessarily interpreted the term "net retained lines only" as used in paragraph 6 of plaintiff's Exhibit 1 with reference to the retained line of the appellant upon this bridge was \$50,000; and, also, for the reason that it was conclusively proven in the trial of this action that under the invariable usage of persons engaged in the reinsurance business, policies of catastrophe excess loss insurance, such as plaintiff's Exhibit 1, *are never used in computing net retention*, and that, therefore, the court should have found that the net retention of the appellant in this case was \$50,000.

4. In making its Finding of Fact XIV for the same reason as hereinabove specified with regard to its making of Finding of Fact XIII.

5. In stating in Finding of Fact XV that the

amount of defendant's actual liability to the plaintiff was \$26,897.55 together with interest, instead of \$40,148.72, with interest, as stated in the amended complaint, for the reason that the computation of the court is based upon the assumption that the net retention of the plaintiff was \$32,000, while for the reasons stated in Specification of Error 3, it should have assumed that such net retention was \$50,000.

6. In making its Finding of Fact XVI for the reasons as stated above in Specification of Error 3, and, also, because the said expressions (contained in Article VIII) are not plain, clear or unambiguous, but on the contrary appear upon their face to be clearly technical terms and are such terms as under the law applicable thereto require evidence as to the usages and customs of the insurance business to properly interpret them, and further for the reason that the evidence is conclusive in this case that even assuming that such expressions are plain, clear and unambiguous, they have a definite meaning when used in reinsurance contracts to the effect that policies of catastrophe excess loss insurance, such as Defendant's Exhibit 1, are never considered in computing such net retentions.

7. In making its Finding of Fact XVII for the reason that it was the contention of the appellant (in the language of the contract) that the term "PML" as used in its wire of June 10, 1940, and its Daily Report No. 10852, indicated that in the judgment of the appellant there was no risk involved greater than 50% of the amount of insurance placed; and for the further reason that the evidence is conclusive in this

case that according to the usages and customs of the insurance business the term "PML" indicates that it is the judgment of the person using such term that there is no risk involved greater than the said percentage, and that in this case it indicated that in the judgment of the appellant "one risk," as used in Article VIII of the Reinsurance Agreement and as applied by the appellant in this transaction and as commonly understood among insurance men, did not exceed \$25,000.

8. In concluding that the appellant was entitled to no recovery instead of concluding that the appellant was entitled to recovery as prayed in the amended complaint, less the amount tendered and paid by the appellee as stated in Finding of Fact XV.

9. In entering judgment in accordance with its conclusion of law instead of entering judgment in favor of the appellant for the amount as prayed in the amended complaint, less the amount tendered and paid by the appellee as stated in Finding of Fact XV.

(f) ARGUMENT

Inasmuch as all of the errors hereinabove specified are based upon the conclusion of the trial court as stated in Finding of Fact XVI "that the terms of Article VIII of said treaty are plain, clear and unambiguous" and, therefore, "do not permit of modification, amendment or interpretation by extrinsic evidence," we believe that it would be conducive to clearness and conciseness to argue all the specifications of error together pursuant to the following:

Summary

1. Oral testimony is admissible to define the meaning of words used in an agreement where it appears that under the circumstances the words were used in a sense different from their ordinary meaning.

2. The evidence in this case is undisputed and conclusive that, according to the usage of the insurance business, the existence of a catastrophe excess policy such as Defendant's Exhibit 1 herein is never taken into account in computing "net retention."

3. The reasons given by the appellee's witnesses for their never having seen an instance of excess insurance being taken into account in computing "net retention,"

First: Where the amount of the attachment point (here \$30,000) exceeds the "net retention" on a "single risk."

Second: Where the existence of the excess reinsurance is known or made known to the pro rata contributing reinsurer.

4. The real reason for the usage.

1. ORAL TESTIMONY IS ADMISSIBLE TO DEFINE THE MEANING OF WORDS USED IN AN AGREEMENT WHERE IT APPEARS THAT UNDER THE CIRCUMSTANCES THE WORDS WERE USED IN A SENSE DIFFERENT FROM THEIR ORDINARY MEANING.

This entire controversy depends upon whether the expressions used in Defendant's Exhibit A-1 (Tr. 92), "We will retain \$50,000," and in Defendant's Exhibit A-5, "Northwestern retains identical \$50,000," were true as the word "retain" would be defined according to the usage common in the insurance business, or whether the appellant actually retained but \$32,000.

As the law applicable to this controversy, we find the following:

"§245. Usage is habitual or customary practice. Comment: a. Usage is not in itself a legal rule, but merely habit or practice in fact. * * * A usage may prevail * * * in only a special trade."

"§246. Operative usages have the effect of (a) defining the meaning of the words of the agreement or the meaning of other manifestations of intention. * * *

"Comment on Clause (a):

"a. The rule stated in the clause is not confined to unfamiliar words or to words often used ambiguously. Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear. What usages are operative is stated in §247."

“§247. A usage is operative upon parties to a transaction where and only where

“(a) they manifest to each other an assent that the usage shall be operative or

“(b) either party intends the effect of his words or other acts to be governed by the usage and the other party knows or has reason to know this intention, or

“(c) the usage exists in such transactions and each party knows of the usage or it is generally known by persons under similar circumstances, unless either party knows or has reason to know that the other party has an intention inconsistent with the usage.”

“§248. * * * (2) Where both parties to a transaction are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention.” (Restatement of the Law of Contracts, pp. 345-354)

“Another class of cases in which an apparent, or sometimes, perhaps, a real exception occurs, is that in which external evidence is admitted to explain the meaning in which particular terms in a contract were understood by the parties, having regard to the language current * * * among persons dealing in that kind of business. * * * The terms thus explained need not be ambiguous on their face. Parol evidence is equally admissible to explain words in themselves ambiguous or obscure and to show as in the case of ‘a thousand of rabbits,’ that common words were used in a special sense.” (Pollock’s Principles of Contracts, Tenth Edition, pp. 248, 249)

“§650. * * * But there are now numerous de-

cisions (not all of them of recent date) where words with a clear normal meaning have been shown by usage to bear a meaning which nothing in the context would suggest. This is not only true of technical terms, but of language, which, at least on its fact, has no peculiar or technical significance; though even today it is still occasionally said by courts that usage cannot control words having 'a definite legal meaning;' or cannot be used to interpret a contract unless there is uncertainty on the face of the instrument. So it is often said also that usage is admissible to explain what is doubtful but never to contradict what is plain. If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of the usage were excluded (and this is what the statement seems naturally to mean) it is inconsistent with many decisions and wrong in principle." (Williston on Contracts, Revised Edition (1936) pp. 1874-1876)

"The liberal rule, on the other hand, is today conceded, practically everywhere, to permit resort in any case to the *usage* of a *trade* or *locality*, no matter how plain the apparent sense of the word, to the ordinary reader; and some of the extreme instances are persuasive to demonstrate the fallacy of ignoring the purely relative meaning of words, and the injustice of attempting to enforce a supposed rigid standard." (Wigmore on Evidence, Third Edition, Vol. 9, §2463, p. 204)

"Evidence of usage may be admissible to construe particular words and terms which, in reference to the subject matter of the contract, have by usage acquired a meaning different from their popular one, even though the words are unambiguous in their ordinary sense." (25 C.J.S., p. 111, Customs and Usages §24)

“Notwithstanding the parol evidence rule, parol evidence is always receivable to define and explain the meaning of words in a contract which are technical, or which have two meanings—the one common and universal, and the other technical; permitting oral evidence in cases of this kind is not allowing it for the purpose of varying or altering the contract or putting a different sense or construction upon its language from that which it would ordinarily bear, but is allowing it for the purpose of showing what was the real intention in using such language. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally. 10 R.C.L. 1072.”

“Such a technical or trade meaning is usually proved by evidence of trade custom or usage. See 27 R.C.L. 170.”

“As indicated in the above title, it is the purpose of the annotation to collect only those cases where the terms of the contract are unambiguous on their face.” (89 A.L.R. 1229)

The annotation then proceeds from this statement on page 1229 to page 1253 with citations of cases upon this question, and it is manifestly not possible to cite so many cases in this brief, nor do we believe that any citation or analysis of these cases by us would be of any assistance to this court in view of the able and unprejudiced analysis given to them by the editors of this note. It is sufficient to say that after a careful analysis of all these cases one must necessarily arrive at the conclusion that the editors of this note were absolutely correct in their conclusion which we have above quoted.

2. THE EVIDENCE IN THIS CASE IS UNDISPUTED AND CONCLUSIVE THAT, ACCORDING TO THE USAGE OF THE INSURANCE BUSINESS, THE EXISTENCE OF A CATASTROPHE EXCESS POLICY SUCH AS DEFENDANT'S EXHIBIT 1 HEREIN IS NEVER TAKEN INTO ACCOUNT IN COMPUTING "NET RETENTION."

In the appellant's case, Karl P. Blaise who since 1932 had been Vice-President and Secretary of a re-insuring company which dealt in nothing but reinsurance, defined net retention as "that amount of liability on a given risk remaining to the account of the primary company after the deduction of all *specific* reinsurance from the gross line relating to that particular risk" (Tr. 170) (Italics ours). He then translated this technical language into the plain statement that inasmuch as the \$350,000 which the appellant had placed on this bridge had been reduced by specific reinsurance to \$50,000, the sum of \$50,000 would be the net retention of the appellant under that policy (Tr. 170). This witness further testified that never in his experience had he ever seen on a report of cession of reinsurance any reference to the existence of catastrophe excess insurance "because it has nothing to do with the reduction of the liability on any given individual risk" (Tr. 178)

The witness John F. Sullivan, Associate Manager of a reinsurance brokerage firm, and who had been a deputy insurance commissioner in the State of Washington from April 1, 1933, to October 1, 1942 (Tr. 185) defined net retention as follows:

"Net retention as it is used in the trade means

the amount which a company would retain of the risk for its own account of a policy of insurance which would have been issued for possibly a larger amount, and they may have ceded off or given off some of the risk to other companies through means of reinsurance" (Tr. 186)

Also,

"A. If a company cedes off by means of specific reinsurance, it reduces the amount it has at risk. Q. Does catastrophe excess reinsurance affect in any way the net retention of an insuring company? A. No, it does not" (Tr. 187)

This witness further stated that examinations are periodically made of all insurance companies by the various insurance departments of the different states (Tr. 190) and that the reports of such examinations show both their gross and their net retention of risk which each company has on its books, and that the net retention, as shown in the report, does not "take into consideration the existence of catastrophe reinsurance" (Tr. 191)

John J. Beall, Executive Vice-President of the appellant and the officer of the appellant who had in 1928 negotiated the first reinsurance agreement with the appellee (Tr. 225), defined net retention as "net retention refers to the amount of the primary insurance for which the primary company is liable, less the amount of specific reinsurance ceded" (Tr. 213). He then, for the purpose of illustrating this language, took the case in point where the appellant had assumed liability upon its original insurance in the sum of \$350,000, had placed specific reinsurance totalling \$300,000, which left its retention in the sum of \$50,-

000 (Tr. 213). This witness then immediately testified that the existence of catastrophe excess insurance, as evidenced by Defendant's Exhibit 1, had no effect on the amount of retention (Tr. 213).

The Appellee's Assistant-Secretary, J. M. Legris, testified that the appellee itself recognized this usage. When shown Plaintiff's Exhibit 2 (Tr. 125-128), he interpreted it (Tr. 117) as a cession of reinsurance from *appellee* to *appellant*, showing a retention of \$71,000 on wind insurance, which was after having ceded to the appellant \$141,199 of specific reinsurance, showing how the *appellee* treated a transaction similar to the present one. Upon being asked to suppose that a loss had been sufficiently large to take up \$50,000 of the appellee's \$71,000 retention, he stated that the appellee would have paid only \$18,500 out of that \$71,000 retention, on account of its catastrophe excess coverage (Tr. 123). We will, subsequently in this brief, take up the reason which this witness gave for the appellee's stating a \$71,000 retention when it had provided that it might, on a \$50,000 loss, reimburse itself out of excess reinsurance so that its net loss would be but \$18,500, but it is necessary at this time only to state that Mr. Legris made no claim whatsoever that this statement of a net retention of \$71,000 was in violation of any contract right of the appellant or of any rule of good faith or of any intent to lead the appellant (here the reinsurer) into a false assurance that the ceding company (here the appellee) would "at all times have as much at stake, dollar for dollar, in the particular insurance, as the reinsurer" (here the appellant). Nor was there any

claim asserted by Mr. Legris that making this statement of net retention of \$71,000 was in any way lessening the dependence owed to the reinsurer (here the appellant) "upon the knowledge, judgment, diligence and good faith of the ceding company" (here the appellee) "in investigating and appraising the risk, placing the original insurance and making investigations and adjustments in the event of loss" (portions in quotation marks are quotations from Finding of Fact XII, Tr. 75). In other words, in this case, where it appeared that the appellee had stated a net retention of \$71,000, in spite of the fact that a \$50,000 loss would have been reduced by catastrophe excess insurance to an \$18,500 loss, Mr. Legris did not testify that this was done with any intent to violate any of the rules of good faith or any of the rights of the appellee as the trial court, in its Findings XII, found the reinsurer was entitled to.

After these witnesses had testified, the court adjourned the trial of the case for nearly ~~three~~ ^{four} months in order to permit the appellee to produce evidence to contradict this testimony. Upon the resumption of the trial of this case, the appellee produced the depositions of four witnesses and the oral testimony of one witness, *and not a single one of these witnesses testified that ever in his experience had he ever actually seen net retention computed by taking into account excess insurance of the type of Defendant's Exhibit 1.*

On the contrary, each one of these witnesses, applying to the present situation the words "its nett retained lines only," as used in paragraph 6 of the Lloyd's policy, Defendant's Exhibit 1 (Tr. 205), in-

terpreted those words to mean \$50,000. If any organization should be taken as authority on the proper use of words in the reinsurance business, it most certainly should be the Lloyds organization. These words are here used in a printed form and the quaint language used indicates that it is not a new form. The words occur in the following sentence: "The amount of loss in excess of which liability attaches hereunder, is understood and agreed to the ultimate nett loss of the reinsured company on its nett retained lines only." In other words, in computing the amount of any loss which the Lloyds organization was to pay to the appellant, the starting figure must be the "nett retained lines only" of the reinsured appellant, and all of these witnesses stated such starting figure at \$50,000.

The appellee's Assistant Secretary, who was representing the appellee at the trial of this case, was shown this Lloyd's policy for the purpose of obtaining his interpretation thereof. His attention was particularly called to this clause and he read it to the court (Tr. 146) and thereupon was asked and answered as follows:

"Now the basis of the amount of loss then would be contained in that clause you have read, would it not? A. I would say so, yes." (Tr. 146)

Thereupon, he was asked to show how he would compute the net retention of the appellant, and he answered as follows:

"Under the Tacoma Narrows Bridge reinsurance to the Union the Northwestern stated to the Union that its net retention was \$50,000.

That \$50,000 is an amount in excess of the first loss of \$30,000 provided for in this catastrophe coverage I have before me, Exhibit "1," and that being so from the \$50,000 you would first deduct the first loss of \$30,000, which would leave the amount of \$20,000. Then from the contract the reinsurance covers 90% of that excess of \$20,000, and leaves a liability to the Northwestern of 10%; 10% of \$20,000 is \$2,000, which added to the first loss of \$30,000 shows a net retained line, as I would understand it from this contract, to be \$32,000." (Tr. 147)

In other words, this witness started out with the assumption that the appellant's "net retention was \$50,000," and finished with the conclusion that the appellant's net retention was \$32,000!

Truly, language under which a certain quantity can shrink from \$50,000 to \$32,000 in the course of a short mathematical demonstration should be subject to some explanation by extrinsic testimony.

This policy, Plaintiff's Exhibit 1, was further made a part of the hypothetical question which was propounded to each one of the appellee's expert witnesses (Pryce, Tr. 243, 244; Newman, Tr. 263; Stewart, Tr. 285; Thompson, Tr. 299, 300; Towers, Tr. 314, 315).

All of these witnesses, experienced in the customs and usages of the insurance business, testified that in case of a total loss of this bridge the appellant would be entitled to recover upon this insurance agreement, Defendant's Exhibit 1, the sum of \$18,000, being 90 per cent of the excess of \$50,000 over \$30,000 (Legris, Tr. 111; Pryce, Tr. 246; Newman, Tr. 266; Stewart,

Tr. 288; Thompson, Tr. 302; Towers, Tr. 328), in spite of the fact that paragraph 6 of this policy, as we have hereinbefore shown, provided that the basis of the recovery of the appellant should be its "nett retained lines only." In other words, each one of these witnesses interpreted the expression "nett retained lines only," as used in the Lloyd's policy, to mean \$50,000 and not \$32,000, and then, by following the same process of mathematical legerdemain arrived at the conclusion that \$50,000 had shrunk~~en~~ to \$32,000.

These witnesses were all of them long on advice to the court as to how it should decide this case, but this advice was founded upon a statement by examining counsel of a hypothetical case, which (as is usual in such cases) contained only the facts which examining counsel claimed to exist in this case, and did not contain all the facts which were clearly proven in this case. Now, the question upon which these witnesses were supposed to testify was whether there was a usage or custom of the insurance business and in the insurance world whereby "the term 'net retention' or the term 'amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company,' does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention" (Tr. 165). The witnesses for the appellant had specifically answered that there was such a usage and had specifically stated that never in their experience had catastrophe excess insurance been considered

in arriving at "net retention." There is no doubt but what the computing of "net retention" is an ordinary practice in the reinsurance business, and the appellant's witnesses had testified positively that never in their experience had they ever seen catastrophe excess insurance considered in arriving at "net retention," and the express purpose of the court's adjourning the trial was to enable the appellee to contradict this testimony if it could do so. But on the contrary, the testimony of the appellee's witnesses consists purely of legal opinions of persons who had no first hand knowledge of the facts of this case, but who freely expressed their individual opinions as to how the court should decide this case founded upon incomplete statements of fact made to them by examining counsel. The net result remains that after nearly three months of what must have been a diligent search over the entire country, the appellee was absolutely unable to produce testimony of a single instance where catastrophe excess reinsurance had been taken into account in computing "net retention."

3. THE REASONS GIVEN BY THE APPELLEE'S WITNESSES FOR THEIR NEVER HAVING SEEN AN INSTANCE OF EXCESS INSURANCE BEING TAKEN INTO ACCOUNT IN COMPUTING NET RETENTION.

The witnesses for the appellee stated two circumstances under which catastrophe excess reinsurance is admittedly not taken into account in computing "net retention."

First: Where the amount of the attachment point

(here \$30,000) exceeds the net retention on a single risk.

Second: Where the existence of the excess reinsurance is known or made known to the pro rata contributing reinsurer.

Some of the witnesses stated one of these sets of circumstances, some the other, but no witness stated that both sets of circumstance had to be concurrent. We will take up each set and show that such circumstances existed in this case.

First: Where the amount of the attachment point of the excess reinsurance (here \$30,000) exceeds the net retention of the reinsured company on a single risk. The witness, J. M. Legris, Assistant Secretary of the appellee, was shown Plaintiff's Exhibit 2 for identification (Tr. 116). This exhibit, after having been admitted in evidence, is set out at Tr. 125-128. According to this witness, it shows a retention by the appellee of \$71,000 wind insurance (Tr. 117, 122). On being asked (Tr. 123):

"Q. * * * Suppose a loss had been sufficiently large to take up \$50,000 of your \$71,000 retention, how much would you have had to pay? A. \$18,500. Q. Why would you have had to pay only \$18,500, instead of the full \$50,000? A. Because the loss would have involved so many of these individual units under this insurance that the catastrophe coverage in the aggregate on the individual units would have come into play. Q. And would have reimbursed you for all of that in excess of \$18,500? A. Yes, sir. Q. Where in that daily report to the Northwestern did you disclose that under those circumstances your net

retention would have been only \$18,500 instead of \$71,000? A. Nowhere. Q. Why did you not do it? A. Because this particular type of coverage is a coverage which is not an individual unit coverage; but is a coverage on a multitude of risks. Q. The real reason is you could not tell until after a loss whether your excess contract would ever come into play or not, is that not true? A. That is true. Q. It would be physically impossible for you to report any other net retention than \$71,000? A. That is true. Q. Because you could not determine it until the loss occurred? A. That is right. Q. And your distinction, as I get your testimony, between your situation where you did not report and the Northwestern's ceding to you this bridge insurance, is that you assumed there was one risk instead of more? A. That is right." (Tr. 123, 124)

Appellee's witness, John D. Pryce, stated: "A. I would say that if the Northwestern's net retention on a risk is more than \$30,000 it is obvious that this excess policy could be involved in a loss on one risk alone" (Tr. 259). Note that the condition is that a risk should be more than \$30,000.

Also, the appellee's witness, Walter J. Thompson, being asked: "What is the meaning in the insurance business of the term retained net without reinsurance by the reinsured company at its own cost and liability," stated:

"A. It would mean that the reinsurer under this treaty would not have a liability for loss greater than the ceding company is willing to bear on the same risk after taking into consideration all reinsurance including excess of loss re-

insurance *which would apply on one risk*. Now, I just like to qualify that by saying that if the ceding company's loss on any one risk or any particular risk were reduced by the pro rata application over several risks or any number of risks on a recovery made by them under a catastrophe cover, such reduction would not constitute a violation of their retention. It would be assumed that the excess point in any catastrophe—in any such catastrophe cover would be as great as or greater than the retention of the company on that particular risk or on any one risk." (Tr. 300, 301) (*Italics ours*).

Also, in the testimony of John Alden Towers, expert witness produced by the appellee, we find the following (beginning at foot of Tr. 343):

"Q. * * * My question was this. That where the amount retained is less than the attaching point of the catastrophe policy on a single risk, then that catastrophe policy need not be considered in reporting that retention? A. That is correct. If the retention—net loss retention—catastrophe cover under an excess of loss cover exceeds the amount retained net by the company ceding, I would say it would be customary for the accepting company to waive the coverage—to ignore it. Q. (By Mr. Cook): Mr. Towers, getting back to this same thought we had before recess, do I understand that if the retention as reported by the Northwestern to the Union had been less than \$30,000 on a single risk, then there would be no complaint on the part of the Union? A. It would be customary that there would be no complaint. I cannot say what the Union might have done. Q. If the retention of the Northwestern on a single risk was less than \$30,000.00 would the method

employed here be in accordance with the practice of the insurance world? A. My answer is yes. Q. And there would be in your judgment no need for them to have said anything about the existence of Plaintiff's Exhibit No. 1? A. It would normally have been done, but not on a cession. It would normally have been done at the time the treaty was in force, and normally the treaty would have said, 'Catastrophe reinsurance ignored for the purpose of this contract,' or words to that effect. Q. But it could have no effect if their retention on a single risk was less than \$30,000? A. It would not be customary to object to the claim—that is really what you are after." (Tr. 343-345)

In the above quotations we have the positive statements of the appellee's most important expert witness and the admission of the appellee's officer, Mr. Legris, that if the amount of the net retention of the appellant *on one risk* was less than \$30,000, the amount stated in Defendant's Exhibit 1 as the attaching point of the coverage there provided for, there would be absolutely no necessity for paying any attention to the existence of this Defendant's Exhibit 1 in computing the net retention of the appellant.

The above statement contains but one term which requires explaining, and that is, "What is 'one risk' as there used?" This term was defined for purpose of this trial in the following incident (Tr. 131): During the cross-examination of the appellee's witness, J. M. Legris, the attention of the witness was directed to Sheet 3 of Plaintiff's Exhibit 3, which is copied at Tr. 218. Thereupon the following occurred:

"Q. Is there anything on that sheet to indicate

this is
a direct
damage
retention
could
be the
primary
policy
instead

there is more than one risk involved, except the estimated PML. A. Nothing. The Court: You mean risk on property other than that covered by the known and expressly accepted risk? Mr. Cook: No. A risk, as we use the word, is any one part of a property which is subject, in the judgment of the underwriter, to one loss. Q. Is that not a fair statement of that, Mr. Legris? A. That is fair enough, yes, sir. Q. In other words, one unit may be considered, in the judgment of the underwriter, as two risks, is that true?

A. Yes, sir." (Tr. 131)

The various witnesses gave various examples of what was "one risk," and what was more than "one risk," as, for instance, the witness Towers mentioned a 44-story modern fire-resisting building and stated: "Some underwriters would say each one of those floors might be a risk. Others might say three or more floors would be a risk" (Tr. 330). This witness, when asked to explain, "What is a single risk in the insurance world," answered: "Well, I spent three weeks trying to word a definition of single risk which would be approved by certain underwriters on a contract before I got an answer which was approved, and later found that there were flaws in that definition, and so I am afraid that I cannot answer that question" (Tr. 345). This witness further testified:

"Q. It is of course customary in all kinds of insurance, is it not, for an underwriter to determine the number of risks on a particular property? A. An underwriter reviews the diagram of the risk of such inspection reports as he might have or descriptions of the risk, and deter-

mines to his own satisfaction whether he considers it more than one risk, yes, for the purposes of the perils covered. Q. That is the customary and accepted method of underwriting property, is it not? A. Yes, sir. And this opinion varies with different underwriters." (Tr. 346, 347)

It therefore appearing that the term "one risk" carries in the insurance world no definite formula for its calculations, the reinsurance agreement between the parties to this law suit provided in Article VIII that "*the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company*" (Tr. 32). It must be taken, also, as a conceded fact that there is no rule that one structure cannot involve more than "one risk."

There can be no question but what the appellant had the right and duty to determine and had determined that "one risk" involved in writing the insurance on this bridge did not exceed 50% of the insurance written. Q

The appellant's Executive Vice-President, John J. Beall, testified as follows:

"Q. But at the time the policy was issued and this insurance ceded to the Union it was your judgment, the judgment of the company in underwriting, that the possible maximum loss from any one event would not exceed 50% of the value? A. That is right. Q. Is that correct? A. That is correct. Q. Are you prepared to say you used your good judgment in making such an appraisal on that risk? A. Yes, sir. Q. And you acted in good faith in so doing? A. That is true." (Tr. 222, 223)

Felix F. Kurz, Vice-President of the General Insurance Company of America, which placed \$1,000,000 gross of insurance on this same bridge (Tr. 383), testified as follows:

“A. Actually when we have a component unit of the same structure, as for example this bridge, or a fireproof building, we do not divide it down quite as finely as we would if each of those units was distinctly and definitely separated. In this case the bridge had several piers, it had approaches, it was supported by cables, and at the time we underwrote that bridge we thought at the very most 50% would represent the maximum loss. Q. Wasn't it your opinion that no matter what hazard or catastrophe occurred that the bridge would not be totally destroyed, but the worst that would happen to it would be 50% destroyed? A. Yes, sir. Q. Wasn't that really an estimate of the probability of the amount of loss in the event of any storm hazard? A. Yes.” (Tr. 384)

Mr. H. D. Heath, an assistant secretary of the appellant, in his letter addressed to the appellee (Tr. 97, 98) gave a breakdown of the various parts of this bridge, and states:

“On our reinsurance certificate we indicated probable maximum liability of 50%, but we never for a moment entertained a thought that there would ever be damage equal to 50% of the total value, let alone nearly 80%.”

In paragraph 8 of the Amended Complaint appears a letter written by counsel for the appellant to the appellee, which contains the following:

“We have read the correspondence which has

passed between you and Mr. J. J. Beall, Executive Vice-President of the Association, and we fully agree upon his stand to the effect that they were clearly empowered under the terms of the Reinsurance Agreement existing between you to consider that this reinsurance involved not more than \$25,000 on a single risk. I therefore see no necessity of repeating his argument upon this point." (Tr. 44)

To this letter the appellee replied by the letter set out on page 46 of the Transcript, wherein we find the following:

"With reference to your letter of December 29, regarding the Northwestern Mutual Fire Association's claim in connection with the above loss, we have not at any time questioned the points which you mention." (Tr. 46).

The passing between the parties of these two letters is expressly admitted in the defendant's amended answer (Tr. 60) and there is no attempt in the pleading to minimize the effect thereof.

It thus appears that the appellee admitted that it had no contention to make as against the claim of the appellant that it, the appellant, had adjudged that "one risk" in this case was 50% which, applied to the net retention of the appellant, amounted to \$25,000, and that such judgment was final. This case was finally submitted to the court over a year after the passing of these letters, during which time the appellee most certainly had ample opportunity to obtain (if obtainable) any testimony to the effect that the appellant was guilty of any fraud or over-reaching in thus evaluating "one risk," and there is noth-

ing in this case to indicate that this judgment was in any wise negligent or fraudulent.

Therefore, it is most certainly and absolutely a proven fact in this case that "one risk," as used in the contract and as used by the witnesses Legris and Towers in the quotations above set forth, was \$25,000, and this sum is less than the \$30,000 which was fixed by Defendant's Exhibit 1 as the attaching point where the excess insurance was to start.

In this connection we might mention that counsel for the appellee made considerable ado in the trial court over their claim that the judgment of the appellant that "one risk" was 50% was never communicated to the appellee. A perfect answer to this claim is that it was communicated. The telegram offering this cession, Defendant's Exhibit A-1 (Tr. 92), stated: "Further information just received indicates PML about 50%." Defendant's Exhibit A-5, the definite report of this cession of reinsurance (Tr. 94), states: "P.M.L. 50%," and Mr. Legris, the officer of the appellee, whose duty it was to interpret these terms for and on behalf of the appellee, stated:

"Q. May I ask you if it is not a fact that there is no—it is understood that there is no risk involved greater than the estimated PML? A. In those sheets? Q. In those sheets or in your other dealings with the company? A. I believe that is so, yes." (Tr. 134)

Thereupon, he attempted to explain this answer, but he closed this explanation with the following statement:

"A. The PML determines the amount of the

retention by the ceding company on any one risk, because the PML, by itself—by its express percentage—says the quality of the risk is a certain quality, and what in the judgment of the underwriter of the ceding company it is expected a loss may be under that particular risk.” (Tr. 135)

If we now take the formula contained in the last above quoted answer and apply thereto the quantities which were known by reason of having been expressly stated in Defendant's Exhibits A-1 and A-5, to-wit: PML 50%, and retention by the ceding company \$50,000, we will have “the PML (50%) determines the amount of the retention by the ceding company (\$50,000) on any one risk,” which by a simple process of mathematics results in \$25,000 as the amount specifically stated in these two exhibits to have been what in the judgment of the underwriter of the ceding company was “one risk.” Now, \$25,000 is a less sum than \$30,000, which was the attaching point named in the catastrophe excess policy, Defendant's Exhibit 1.

In the portion of the testimony of Mr. Legris which we have already quoted from Tr. 123 and 124, he stated that the difference between the case of the cession of reinsurance from the appellee to the appellant set forth in plaintiff's Exhibit 2 and the appellant's ceding to the appellee reinsurance on this bridge, was that he “assumed there was one risk instead of more.” As we have shown, this assumption was purely a matter of the witnesses's imagination, arising probably out of the fact that the subject matter of the

insurance was a bridge; but whatever was the basis of his assumption, it could not have been obtained from Defendant's Exhibit A-1 or Defendant's Exhibit A-5, because as we have shown, these exhibits expressly notified the appellee that in the judgment of the appellant there was no one risk involved greater than 50% of the amount retained net by the appellant or 50% of the amount ceded to the appellee.

Counsel for the appellee meticulously asked its expert witnesses questions of which the following is typical:

"Q. To what extent, if any, is the term 'P.M.L.' used to indicate the number of risks involved by reinsured companies, in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?" (Tr. 247, 267, 288, 302, and 330)

The answer to this question must necessarily and obviously be "none" for the reason that the only information on this point that is material is the size of the maximum "one risk" which is involved in the transaction; and when that information is given, it is absolutely immaterial into how many individual risks the balance of the transaction could be divided. *It will be noticed that the reinsurance agreement set out in this case makes absolutely no mention of the number of risks involved in a transaction, the only mention being the limitation contained in Article VIII of the size of "one risk" and the further provision that "the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company."*

As stated by Mr. Beall (which is merely a truism) "you might have two risks entirely separate, the 66⅔ of your valuation in one and 33⅓ in the other (Tr. 232)."

We might take, for example, the last item set out in Defendant's Exhibit A17, Tr. 364, wherein the PML is set at 60%, while the subject matter of the insurance is 22 items of property located in 16 towns. This would mean that it was the judgment of the reinsured company that there was "one risk" involved in this transaction which amounted to 60% of the insurance. This might be but one of the 22 descriptions, or might be half a dozen of those 22 descriptions, if there were that many so close together as to constitute one risk. It is easy to see that the reinsurer is in no way interested whatever in the number of the lesser risks involved in the transactions. What the reinsured ~~is~~ is interested in in this matter (and the only thing) is the size of the greatest one of the risks involved; and as we have heretofore shown, *it was Mr. Legris' understanding that this risk was not greater than the expressed PML.*

Or we might take the cession made by the appellee to the appellant, shown as Plaintiff's Exhibit 2 on page 125, and which is explained by Mr. Legris on pages 120 to 123. From this explanation, it appears that the aggregate insurance placed by the appellee on this property was \$4,260,000. The PML was expressed at 3%, or \$127,800, which was the amount of the fire retention. It appears on page 126 that this policy covered extremely numerous structures and items of personalty. There was no attempt made to

tell just how numerous these different items of insurance were, but the statement that the PML was 3%, which told the reinsuring company the limit of the maximum risk, was all that was required.

So, in the cession of this bridge, the breakdown of the costs of the various items constituting this bridge appears in Defendant's Exhibit A-8 (Tr. 98). Taking only unit 6 there, we readily see that "approach, grading, and paving, administrative building and toll booths, toll house equipment and lighting system" must necessarily have constituted numerous separate risks; but there was no attempt to count these separate risks. What the appellant had done in this case was compute the value of all of the property which might be involved in one single loss, and state that in terms of percentage of the whole. This they did and stated to the appellee that this sum, or the PML, was 50%. From this, Mr. Legris, according to his own testimony, understood that it was the judgment of the appellant that the greatest single risk involved in this insurance was 50% of such insurance. Inasmuch as there could be not the slightest doubt that the answer to this question so tediously propounded by counsel for appellee must necessarily be "none," it is evident that this question was asked in an attempt to impeach the appellant's witness Beall because he adopted the insurance man's vernacular in referring to a 50% PML as a "two-risk" transaction. All that he meant, or could have meant, was, as he hastened to explain at the beginning of his cross-examination, "50% would indicate two and 25% would indicate four."

question?

4. THE APPELLEE HAD KNOWLEDGE OR NOTICE OF THE EXISTENCE OF THE CATASTROPHE EXCESS INSURANCE CARRIED BY THE APPELLANT.

The expert witnesses produced by the appellee appear to be unanimous that one of the reasons for not taking excess insurance into account in computing net retention is that it is customary for the reinsurer to inform the reinsured of the existence of such excess insurance.

Some of these witnesses thought that it would be better that this information was set out in the reinsurance treaty, but appellee's witness Edwin Stewart testified as follows:

"Q. But from a practical standpoint, and so far as any effect it might have on the Union's accepting that amount, if they knew of the existence of that Lloyd's policy, Exhibit 1, that was all they were entitled to know? A. No. I think it might have influenced their acceptance. * * *

Q. If they knew of the existence of Exhibit 1 and still accepted the amount ceded, the form of reporting of course was very unimportant? A. If they knew it and still accepted the \$50,000, yes." (Tr. 294, 295)

The witness Walter J. Thompson testified as follows:

"In other words, if they actually knew of the existence of this policy they would not be justified in assuming anything? A. That is right." (Tr. 306)

The witness John Alden Towers testified:

"Q. Is it normal for a company ceding reinsurance and stating its net retention to its reinsurer, to advise its reinsurer of the existence of

excess of loss reinsurance which might affect its loss thereafter? A. It is as respects excess of loss, but not as respects catastrophe. Out of an abundance of precaution we advise our clients—Mr. Cook: That is not material what he advises his clients. I don't like to object, but— The Court: The objection is sustained. Q. You say it is customary with respect to excess of loss? A. Yes, sir. Q. How is that done? A. It is done in the printed blanks on specific reinsurance, or in cables or letter correspondence. I am not speaking of treaties now. Companies usually have printed forms, either prepared by the brokers or prepared by their own people, upon which this information is disclosed. As regards treaties it is usually done by specific mention in the treaty, or by exchange of letters." (Tr. 318)

Counsel for the appellee must have been mindful of the rule that information regarding the existence of this catastrophe excess reinsurance would have been equivalent to mentioning it specially in these documents when he asked Mr. Legris on his original direct examination: "Prior to the receipt of that letter of October 1, 1941, by your company, had your company been advised in any way by the Northwestern of this excess catastrophe reinsurance of which it speaks? A. No, sir" (Tr. 105). The force of this answer of Mr. Legris, however, was wiped out by the admission of the same witness upon cross-examination, when he stated as follows:

"Q. Do you mean to tell the court that none of the officers of your company knew the Northwestern carried this excess policy, Plaintiff's Exhibit '1' for identification? A. For myself I would

say I didn't know. Q. You didn't know. A. And I could not tell for the others." (Tr. 138)

It may be that the answer of Mr. Legris, as to whether his company had been "advised in any way" by the appellant as to the existence of this excess catastrophe reinsurance, was truthful if the effect of that question be limited to himself, and if thus limited, his answer could be accepted as true; but he was only one officer of that company and there can be no question but what other officers of the appellee and particularly the officer who negotiated the first reinsurance connection between the parties (Mr. Easton), knew all about this catastrophe insurance as shown by the following evidence.

Mr. Beall, the Executive Vice-President of the appellant, testified as follows:

"Q. Who negotiated the reinsurance contract with the Union under which this reinsurance was ceded to them? A. I did, personally. Q. When? A. I believe the year was 1928. The place was Milwaukee, Wisconsin, and I was talking with Mr. Easton, the former vice-president. Q. Do you recall his initials? A. No, I do not. Q. Is he now connected with that company? A. I think he has retired. Mr. Dumett: Eastman? A. Easton. Q. (Mr. Cook): And is that the same general contract under which this particular business was ceded to the Union? A. If it is not the identical contract there has been no modification in its terms." (Tr. 225)

* * * "A. We had a complete discussion of our underwriting program and of the reinsurance each company carried. Q. As a part of the discussion was the matter of catastrophe contracts

of insurance discussed? A. Yes, sir. Q. Was he advised at that time of the Northwestern's policy of carrying such contracts? A. He was." (Tr. 227, 228)

It must be remembered that this testimony was given in December, 1942, and the trial of the case was subsequently adjourned to April 20, 1943 (Tr. 240). During this time, the appellee had ample opportunity to interview Mr. Easton and to obtain his testimony either by deposition or personal attendance in court if there had been any question as to the truth of Mr. Beall's statement. The fact that they did not take this opportunity would indicate that they were satisfied that the statement of Mr. Beall was true and it, therefore, must be taken as one of the established facts of this case that at the beginning of the reinsurance relationship between these two parties, each party was fully informed as to the details of the excess insurance carried by the other party.

Further more, Mr. Legris, on being asked how he knew that the appellant "was a much stronger company than" the appellee, stated that he received that information from known financial reports, and then stated: "I see a book on the table there, Best's Fire Insurance Report" (Tr. 136). He had known it "a good many years * * * I would say over 20" and had occasion to refer to it from time to time in his business. It had been in the office of the appellee for years and had been referred to by the witness and other officers of his company many times (Tr. 137), but he wouldn't know as to whether any officer of his com-

pany ever looked at or referred to the report of the Northwestern contained in this volume (Tr. 137). Thereupon at the request of appellant's counsel, this witness read to the court from the report contained in that volume regarding appellant:

"A. 'The Association has very satisfactory arrangements under reinsurance treaties for reinsuring excess lines, besides it carries a first excess catastrophe coverage for \$200,000, applicable to all hazards in excess of \$30,000, and the second excess over \$250,000, up to \$500,000, with a group of American reinsurers and London Lloyds.'" (Tr. 138)

This witness, after having further testified that he personally had not looked up the statement of the Northwestern on account of the confidence which he had in the Northwestern, testified as follows:

"Q. Is the reason for that because you are not interested in what catastrophe coverage they carry? A. The answer possibly is this, that we do know from our own experience that catastrophe coverages have their value, and we have confidence when we find the financial stability of a company is of the type we want, that that company is financially strong, because it has safeguarded itself with the usual safeguards of catastrophe coverage. Q. In other words, even without investigation you know that these strong companies do carry covers of that kind? A. Right. Q. Do you not? A. Yes. Q. And you knew the Northwestern carried one? A. *I would say the Northwestern being a financially strong company, in which we have confidence, would normally, like we were doing, carry catastrophe insurance.* Q. And you know they have carried

it for the thirteen or fourteen years you have been doing business with them? A. *I would assume we knew it, because it is a common practice.*" (Tr. 157). (Italics ours).

Furthermore, the appellant's witness John F. Sullivan, for nine years connected with the Insurance Department of the State of Washington, testified that companies domestic in the State of Washington are examined annually by the Washington Department and every three years by examiners from outside states who are invited to participate with the Washington examiners, and that these examinations summarize the terms of catastrophe policies carried by the domestic companies, giving the limits, and that a copy of the report of these examiners is filed with the insurance department of every state in which the company is entitled to do business (Tr. 190, 191). Upon cross-examination, this witness stated that these reports showed the actual amounts of the reinsurance. For the purpose of impeaching this testimony, the appellee offered Defendant's Exhibit A-14, made for the period ending December 31, 1938, by examiners from four states, and Defendant's Exhibits A-15 and A-16, reports made by examiners for the State of Washington for the periods ending December, 1939, and December, 1940. These exhibits specifically mention the excess reinsurance carried by the appellant, Defendant's Exhibit 1, but these particular exhibits do not state the amounts (Tr. 397-400). Therefore, all that they prove toward the impeachment of Mr. Sullivan is that counsel for the appellant, after searching through the department records, was able to find

three reports which did not specifically state the amounts of the excess reinsurance.

To sum up upon this point, the facts are well established in this case that the appellee was specifically informed of this excess insurance at the time of the commencement of the business relations between the parties, that it had in its office at the time of accepting this cession of reinsurance full information regarding the appellant's excess reinsurance in a standard volume of reference; that the only reason why the particular officer of the appellee who testified in this case did not refer to this book to obtain this information was that he was satisfied at the time that the appellant did have this reinsurance and that the information was further available in the official records of the insurance department of his home state.

Therefore, to have specifically mentioned this excess reinsurance during these negotiations would have been futile.

5. THE REAL REASON FOR NOT TAKING INTO ACCOUNT EXCESS INSURANCE IN COMPUTING NET RETENTION.

Inasmuch as the existence of a usage is purely and simply a question of fact to be determined as a question of fact by testimony of witnesses who are supposed to know such fact, the reason for such usage does not enter into the question of whether the court should recognize such usage. It might, however, have a bearing on the court's conclusion as to whether such a usage really exists and, therefore, we would submit that the testimony shows that this usage to

disregard excess reinsurance in computing net retention had its origin in necessity. If we take the present case as a proper example, the appellant's policy of catastrophe excess insurance, Plaintiff's Exhibit 1, insured the appellant against loss in its entire business from any one cause "limited to \$200,000 each and every loss being 90% of the excess of \$30,000 loss each and every loss" (Tr. 200). This means that in case the appellee suffered an aggregate of losses from any one cause of \$200,000, the Lloyds insurers would reimburse the appellee therefor to the extent of 90% of the excess of such loss (\$200,000) over \$30,000, or \$153,000, so that, in the event the appellee suffered a loss of \$200,000, its actual loss after collecting on this policy would be \$47,000, or 23½% of its loss. This percentage, applied to the \$50,000 stated by the appellant as its net retention upon this transaction, would mean that in such an event its loss on this bridge would have been but \$11,750.

On the other hand, if the appellant had suffered several losses, each one of which was less than \$30,000 upon its stated net retention, but amounted in the aggregate to \$50,000, it would have paid that entire \$50,000, or 100%, and in the event of any one loss less than \$30,000, the appellant would, of course, pay 100% of that loss. The net result of this is that the total net loss that the appellant *might* sustain on account of a total loss of this bridge and after exhausting both its specific, contributing reinsurance and its catastrophe excess reinsurance, might vary anywhere from \$11,750 to \$50,000, dependent upon circumstances.

Appellee's counsel, in asking its expert witnesses to compute "the highest possible loss which Northwestern could sustain," was very careful to limit the question by including therein the phrase "in the event of any one loss" (Tr. 246, 266, 288, 302, 328), and this phrase was repeated in the court's Finding of Fact XIII (Tr. 75). Now, if the term "net retention" is so "plain, clear and unambiguous as not to permit modification, amendment or interpretation by extrinsic evidence" (Tr. 78) why is it necessary continually to interpolate this phrase without giving any reason therefor?

Furthermore, if "excess of loss reinsurance such as Plaintiff's Exhibit 1" (Finding XVI, Tr. 79) must be deducted in order to arrive at "net retention," what sum is to be deducted? Is it (1) \$153,000, the maximum amount of the excess insurance, or is it (2) \$38,250, the amount which the appellant would realize on a total loss of this bridge coupled in the same catastrophe with other losses aggregating \$200,000, or is it (3) \$18,000, the amount which the appellant would realize on a total loss of this bridge unconnected with any other loss, or is it (4) \$9,133.85, the amount recoverable by appellant in this case upon its excess reinsurance, or is it (5) nil, the amount which the appellant would realize in the event of a loss within the limits of the greatest loss which, in the judgment of the appellant (which the contract declared to be binding on the appellee) could be sustained, or is it just plain (6) nil, because that is the only amount at which it *can* be placed and permit any recovery at all under paragraph 6 of appellant's excess

reinsurance contract? Here are six tendered interpretations of the meaning of the court's expression (as used in its Finding XVI, Tr. 79) "excess of loss reinsurance such as Plaintiff's Exhibit 1" and we await with interest the explanation of counsel for appellee why the first, second, fourth, fifth and sixth interpretations are so flimsy that the court is justified in ruling that the language in question is so unambiguous as to permit of no interpretative definition.

We respectfully submit that the only refuge of persons in the reinsurance business in this plethora of interpretations was to refuse absolutely to consider catastrophe excess reinsurance in computing "net reinsurance" wherever and however that term should be used; that their usage so to do was conclusively proven; that there was no testimony that such a usage had ever been disregarded; and that, therefore, it should be followed in this case, which would mean that the appellant's "net retention" should be adjudged to be as stated in its cession to the appellee, *i. e.*, \$50,000, and recovery had by the appellant for the amount due as computed on that basis.

Respectfully submitted,

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWESTERN MUTUAL FIRE ASSOCIATION,
a corporation, *Appellant,*

vs.

UNION MUTUAL FIRE INSURANCE COMPANY
OF PROVIDENCE, RHODE ISLAND, a
corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
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WASHINGTON, NORTHERN DIVISION.

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No. 10584

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APPELLEE'S BRIEF

I. JURISDICTION OF THE DISTRICT COURT AND
OF THIS COURT

The jurisdictional facts are established by the complaint (Tr. 2), amended complaint (Tr. 27), answer to amended complaint (Tr. 58), petition, notice and bond for removal (Tr. 15-22), order on removal (Tr. 23), and the District Court's Findings I and II (Tr. 67).

On June 22, 1943, the District Court made and entered its Findings of Fact and Conclusions of Law in favor of Appellee, the same being reported in 50

F. Supp. 785 (See also: Tr. 66). Judgment in favor of the Appellee was entered on the same date (Tr. 80).

The statutory provisions believed to sustain the jurisdiction of the District Court are: 28 U.S.C.A., §§41(1), 71, 72, 81. The statutory provisions believed to sustain the jurisdiction of this Court are: 28 U.S.C.A., §§225, 861(a), 861(b).

II. STATEMENT OF THE CASE

A. Statement of the Issue

The sole question presented by Appellant's opening brief is whether certain findings of fact made by the District Court are supported by the evidence. Appellant's Specification of Errors is addressed to the following Findings: Findings Nos. VIII, XII, XIII, XIV, XV, XVI and XVII (Appellant's Brief, pp. 13-16). Appellant in its Specification of Errors mentions the conclusions of law and judgment, but does not contend that the findings do not support the conclusions and judgment, or that the conclusions do not support the judgment. The question involved is purely factual.

The gist of the case is this: Appellant sues on a written contract, which by its express terms negatives Appellant's cause of action, but Appellant contends that, by custom and usage in the insurance business, the terms of the contract have a meaning different from their meaning in ordinary English. The District Court on conflicting evidence made findings contrary to Appellant's contention. Are the District Court's Findings "clearly erroneous?"

We submit that the Findings are supported by the great preponderance of the evidence.

B. Statement of the Facts

The Appellant in its Statement of the Case has summarized the pleadings and made some reference to the evidence in the case. We believe, however, that for a clear understanding of the issues a further statement of the facts established by the evidence is of importance.

Appellant's case is based solely upon contract—a *particular contract which is in writing*. Appellant sues for a sum which it claims it is entitled to by virtue of the terms of that written contract. The contract is set forth in full in the plaintiff's amended complaint in this action (Tr. 28). The contract, which is dated January 1, 1940, is a reinsurance agreement between Appellee, as the Reinsuring Company, and Appellant, as the Reinsured Company. This type of reinsurance agreement is commonly referred to in the insurance business as a "*Treaty*," and will be so referred to in this brief.

In *Article I* of the Treaty it is provided that Appellant agrees to cede reinsurance to Appellee, and that Appellee agrees to accept such reinsurance, on account of liability arising under policies, binders or entries of the Appellant covering property located anywhere in the United States of America and/or the Dominion of Canada, subject to the terms and conditions of the Treaty (Tr. 28).

Article VII of the Treaty provides that reinsurance thereunder shall be ceded on the *daily report and account current plan*, and that liability shall be made effective by the specific written designation of the reinsuring company by the reinsured company (Tr. 31).

Article VIII of the Treaty provides, among other things, that cessions of reinsurance by Appellant to Appellee under the Treaty *shall in no case and at no time exceed the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property* (Tr. 32). This so-called "net retention clause" is a vitally important part of this reinsurance Treaty (Tr. 103, 115).

Article XIV of the Treaty provides that, if in case of loss it should appear that the amount ceded to the Appellee by the Appellant is in excess of the amount authorized in *Article VIII* of the Treaty, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the Appellee shall not exceed the amount for which it would have been liable had the provision for net retention in *Article VIII* of the Treaty been complied with (Tr. 35).

Appellant in its amended complaint (Tr. 27) alleges that it ceded to Appellee pursuant to the Treaty, \$50,000 of reinsurance covering the Tacoma Narrows Bridge in the State of Washington; further alleges that Appellant, as direct insurer, was compelled to pay a loss upon the bridge and prays for judgment against Appellee in the sum of \$40,148.72, Appellee's alleged share of the loss.

Appellee in its answer (Tr. 58) alleges that under the express terms of the Treaty, Appellant is entitled to collect from Appellee no more than \$25,624.31, plus interest at six per cent per annum to June 21, 1942, or a total amount of \$26,897.55. *This amount was tendered and paid by Appellee to Appellant on*

June 20, 1942, at the time Appellee's answer was served and filed, and was accepted by Appellee on that date without prejudice to the rights of either party (Tr. 64, 77).

During the year 1940 the Washington Toll Bridge Authority constructed a single-span suspension bridge across the Tacoma Narrows, near Tacoma, Washington, known as the Tacoma Narrows Bridge (Tr. 68). Appellant directly wrote \$350,000 of insurance on this bridge, insuring the Washington Toll Bridge Authority against loss or damage by various risks, including windstorm and collapse, upon the bridge and approaches (but excluding the administration building). Appellant specifically reinsured \$300,000 of that amount with various reinsurers, including Appellee, under its various reinsurance treaties (Tr. 68).

On May 31, 1940, Appellant wrote Appellee advising it of the insurance to be written on the Tacoma Narrows Bridge and asked Appellee how much the latter was prepared to accept from Appellant by way of reinsurance on the risk (Tr. 40).

On June 10, 1940, Appellant sent Appellee a telegram (Defendant's Exs. A-1, A-2; Tr. 92, 93), stating in part:

"Further information just received indicates P. M. L. about 50%. *We will retain \$50,000. Please wire your authorization.*" (Italics ours)

To appreciate the importance of this wire it is necessary to refer again to Article VIII of the Treaty, providing that cessions of reinsurance by Appellant to Appellee under the Treaty shall *in no case and at no time exceed the amount retained net without reinsur-*

Northwestern's net without reinsurance is not \$50,000 and your actual loss will therefore be less than the amount indicated, we would appreciate it if you would advise us exactly what your net loss will be on the risk." (Italics ours).

On October 1, 1941, Appellant wrote Appellee (Defendant's Ex. A-8, Tr. 97) answering Appellee's letter of September 8, 1941. In this letter of October 1 Appellant explains that, at the time the policy was written and the reinsurance placed, Appellant had in effect an *excess of loss reinsurance contract*, whereby it was reinsured to the extent of *90 per cent of all loss sustained by it in excess of \$30,000 on the Tacoma Narrows Bridge*. Appellant's letter states:

"The facts of the matter are that at the time this policy was written and the reinsurance placed, the Northwestern had in effect a catastrophe *excess reinsurance contract* whereby we were reinsured to the extent of 90% of all loss in excess of \$30,000 in any one catastrophe, although in establishing our net line *this fact was given no consideration whatsoever*." (Italics ours)

The excess of loss reinsurance contract referred to in Appellant's letter of October 1, 1941, has been introduced in evidence in this case as Plaintiff's Exhibit 1 (Tr. 197). The contract, dated April 19, 1940, is between Appellant and Lloyd's.

It is important to note that, by the terms of this excess of loss reinsurance contract with Lloyd's, Appellant was *reinsured for any net amount for which it might become liable in excess of \$30,000 in any one loss, and then only for 90 per cent of the amount in*

excess of \$30,000. It is important to note, too, that this excess of loss reinsurance applied *in the event of any one loss*, whether *only one structure was involved* or whether a number of separate structures were involved.

This excess of loss reinsurance admittedly applied to the Tacoma Narrows Bridge as a single structure and, as we shall hereafter note, *the absolute top liability of Appellant in the event of any one loss to the Tacoma Narrows Bridge was, by virtue of the existence of Plaintiff's Exhibit 1, limited to \$32,000.*

Appellant throughout its brief refers to Plaintiff's Exhibit 1, as "catastrophe excess reinsurance." As will be noted hereafter, Plaintiff's Exhibit 1, as applied to the Tacoma Narrows Bridge, is properly classified as "*excess of loss reinsurance*," and not as a catastrophe cover.

Appellant's letter of October 1, 1941 (Defendant's Ex. A-8, Tr. 97), from which we have quoted above, was the first notice given by Appellant to Appellee that Appellant's net retention on the Tacoma Narrows Bridge was only \$32,000 (that is, \$30,000, plus 10 per cent of \$20,000), instead of \$50,000 as warranted (Tr. 104, 105). This notice was received by Appellee almost a year after the loss of the Tacoma Narrows Bridge.

On October 10, 1941, Appellee wrote Appellant (Defendant's Ex. A-9, Tr. 99) acknowledging receipt of Appellant's letter of October 1, 1941 (Defendant's Ex. A-8, Tr. 97) and stating in part:

"On the basis of this information, it would appear that we have been overlined on this risk,

as our reinsurance contract with you, under which you cede business to us, provides that cessions shall, in no case, exceed the amount retained net, without reinsurance by the Northwestern.

“On the basis of your letter, we believe that the actual net amount retained by the Northwestern without reinsurance was only \$32,000.00 instead of \$50,000.00 as indicated in the certificate and, on the basis of the contract, our Union line should also have been not exceeding \$32,000.00 which, on the basis of an approximate 77% loss, would make our loss payment only approximately \$25,000.00, instead of \$38,461.54 as called for by the proof of loss submitted.”

Had the provision for net retention in Article VIII of the Treaty been complied with by Appellant, Appellee would have been ceded \$32,000 and would have been liable for its pro rata share of the loss computed on the basis of a \$32,000 cession.

The share of the loss due Appellant from Appellee, computed in accordance with Article XIV of the Treaty (Tr. 35) was \$24,615.38, plus \$1,008.93 for Appellee's share of the adjustment expenses. Thus the total amount due Appellant from Appellee was \$25,624.31 (Tr. 77).

Appellee on June 20, 1942, paid to Appellant this sum of \$25,624.31 plus interest at six per cent per annum to June 21, 1942 (Tr. 64, 77).

Throughout this case Appellant has contended, in effect, that the words *“amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property,”* as used in Article

VIII of the Treaty, really means "amount retained net without reinsurance, *but disregarding excess of loss reinsurance.*"

This contention, in essence, is an attempt by extrinsic evidence to modify and amend Article VIII of the Treaty.

At the trial Appellant demanded the right to introduce extrinsic evidence of alleged custom and usage on this point, and the Court permitted the Appellant to orally amend its amended complaint by adding a paragraph alleging that by custom and usage an exception should be read into Article VIII (Tr. 165, 168).

Thereafter the District Court permitted the Appellant, over Appellee's continuing objection, to introduce extrinsic evidence on this point. This extrinsic evidence consisted of the testimony of Appellant's vice president, Mr. Beall, and of two other witnesses, Messrs. Blaise and Sullivan.

Appellant's counsel asked these witnesses to state "what, in insurance language, is meant by the term 'net retention,' or as in this contract, an amount retained net without reinsurance at its own risk and liability on one specific property" (Tr. 164, 186, 213). The three witnesses made similar answers, of which the following by Mr. Blaise is an example: "The net retention is that amount of liability on a given risk remaining to the account of the primary company after the deduction of all specific reinsurance from the gross line relating to that particular risk" (Tr. 170).

Thereafter the District Court permitted Appellee, without waiving its continuing objection to the admissibility of testimony of custom and usage, to introduce testimony in surrebuttal upon this point. The Appellee introduced the testimony of five of the leading reinsurance authorities in the United States, Messrs. Towers, Newman, Pryce, Stewart and Thompson, all disinterested reinsurance experts, in no way connected with the Appellee (Tr. 242, 261, 284, 298, 307). All of these witnesses testified that under the customs and usages of the insurance business the term "*amount retained net without reinsurance by the re-insured company at its own risk and liability upon the same property*, as used in Article VIII of the Treaty, means what it says — that is, the maximum amount which the ceding company could lose, at its own risk and liability, in the event of a total loss of the Tacoma Narrows Bridge, taking into consideration excess of loss reinsurance, such as Plaintiff's Exhibit 1 (Tr. 197), as well as pro rata reinsurance (Tr. 243, 245, 251, 260, 266, 286, 287, 300, 301, 316, 318, 319, 336). These witnesses testified that Appellant's actual net retention was \$32,000, *not* \$50,000 (Tr. 111, 147, 160, 180, 182, 193, 246, 266, 288, 302, 303, 329, 330). All of the expert witnesses, including those called by Appellant, testified that the highest possible loss which Appellant could sustain at its own risk and liability in the event of a total loss of the bridge, taking into account Appellant's excess of loss reinsurance, was \$32,000 (Tr. 180, 193, 194).

This testimony regarding custom and usage will be discussed later under Section III-A(2) of this brief.

The District Court on June 22, 1943, made and entered its Findings of Fact and Conclusions of Law in favor of the Appellee. These findings of fact and conclusions of law are reported in 122 F.(2d) 699, and will be found on pages 66 to 80 of the transcript in this case.

On the basis of these Findings the District Court on June 22, 1943, entered its Conclusions of Law and Judgment in favor of Appellee (Tr. 79-81).

III. ARGUMENT

SUMMARY

A. The District Court's Findings of Fact Are Clearly Supported by the Great Preponderance of the Evidence.

- (1) It was Appellant's obligation to observe the utmost good faith in correctly stating its actual net retention to Appellee;
- (2) Whether we look to the terms of the Treaty alone, or look further to the evidence of custom and usage, it is clear from the evidence that Appellant failed to correctly state its net retention to Appellee;
- (3) The evidence establishes that Appellee had no notice or knowledge of Appellant's failure to correctly state its net retention until after the loss of the Tacoma Narrows Bridge;
- (4) Appellant's "two-risk" theory and its contention regarding "P. M. L." are clearly contrary to the preponderance of the evidence.

A. THE DISTRICT COURT'S FINDINGS OF FACT ARE CLEARLY SUPPORTED BY THE GREAT PREPONDERANCE OF THE EVIDENCE.

Findings of fact will not be set aside on appeal unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.

Rule 52(a), Rules of Civil Procedure for the District Courts of the United States;

Occidental Life Insurance Co. v. Thomas (C.C.A. 9) 107 F.(2d) 876;

Wittmayer v. United States (C.C.A. 9) 118 F.(2d) 808;

Crowell v. Baker Oil Tools, Inc. (C.C.A. 9) 99 F.(2d) 574;

Storley v. Armour & Co. (C.C.A. 8) 107 F.(2d) 499.

A review of the evidence will clearly establish that the District Court's Findings are supported by the great preponderance of the evidence.

(1) It was Appellant's Obligation to Observe the Utmost Good Faith in Correctly Stating its Actual Net Retention to Appellee.

It is well established by the evidence, and by all the authorities on reinsurance, that the net retention clause in a reinsurance Treaty, such as the clause found in Article VIII of the Treaty in suit, and strict compliance with that clause by the ceding company, are of vital importance to the reinsurer. A reinsurance treaty, such as the Treaty involved here, grants extensive rights to the ceding company to bind the reinsurer. The ceding company is on the ground,

makes the investigation and has all the underwriting details of the property involved. The reinsurer does not have these details. The reinsurer must therefore rely upon the judgment, diligence and good faith of the ceding company in the investigation and evaluation of the risk, the placing of the insurance and the making of all investigations, adjustments and settlements in the event of loss (Tr. 103, 115, 179, 193, 233, 246).

The net retention clause therefore requires that the reinsured company shall maintain a stake in the particular insurance. In the case at bar, the reinsurance treaty requires that the reinsured must retain a stake in the insurance which is identical with the amount of the insurance ceded to the reinsurer. Thus the net retention clause is the reinsurer's best guaranty that the ceding company will perform its full duty at all times.

It is also well established by the authorities that the reinsured must at all times exercise *the utmost good faith* in complying with its net retention obligation and in fully advising its reinsurer with respect to all relevant facts relating thereto.

In "Approach to Reinsurance," by H. Ernest Seer, it is stated on page 31:

"It is evident that this intimate relation can prosper only on the basis of complete honesty and profound mutual trust. This feature cannot be emphasized enough. '*Good faith*' is the backbone of the whole system. All underwriting decisions are so exclusively with the ceding companies that the reinsurer, after conclusion of the

treaty, has no way of influencing the selection of risks except by friendly, voluntary cooperation of the ceding company. The latter could find innumerable occasions for circumventing the provisions of the treaty (for instance, in the apportionment of risks), with very little fear of being detected. Even under obligatory treaties situations can arise where the reinsurer's liability is doubtful, as in the case of a loss occurring prior to the determination of the ceding company's net retention. Finally, a treaty, particularly a large one, creates such important financial relations between the parties that the failure of one company may very well result in a similar fate to the other." (*Italics ours*)

In "The Law and Practice of Reinsurance," by C. E. Golding, Buckley Press, Ltd., 1937, on page 13, it is stated:

"The doctrine of good faith is of universal application as much to reinsurance as to direct insurance. *It calls for the disclosure by the ceding company to the reinsurer of every material fact relating to the risk to be reinsured.*" (*Italics ours*)

Further on page 14 of his treatise Mr. Golding states:

"A fundamental rule of reinsurance is expressed as follows—The foundation of a reinsurance is—

"(1) *Full information, so far as possessed by the ceding company, as to the risk on which the reinsurance is requested:*

"(2) *Full information as to the amount retained by the ceding company on the identical property on which the reinsurance is requested.*" (*Italics ours*)

Futher on page 15 of the same treatise Mr. Golding states:

"It suffices here to say that any failure to disclose such material facts would be a sufficient ground to enable the reinsurer to avoid the contract. * * * Every time a cession is made under a treaty this initiates an actual reinsurance, and though the details which have to be communicated to the reinsurer are limited, yet in the general operation of the Treaty *the ceding company is bound to exercise the utmost good faith towards its reinsurer, even though this must occur after the contract was completed.*" (Italics ours)

John H. Magee, in his treatise "General Insurance," 1939, states on page 100:

"*The Net Retention.* When for any reason a direct writing company desires reinsurance, the reinsurer is interested in knowing to what extent the ceding company remains interested in the risk. The remainder carried by the ceding company after all reinsurance has been placed is referred to as the net line or the net retention. Since the reinsurer in most reinsurance agreements depends upon the ceding company to do the underwriting, the reinsurer would be unwilling to assume any risk which the ceding company itself refused to assume. For this reason, where reinsurance treaties are effected, a clause may be inserted stipulating that the total amount to be reinsured under the treaty shall depend upon the net retention, and it may further be stipulated that the reinsurer shall not be called upon to pay on any loss an amount in excess of that paid on the loss for its own account by the direct writing company. While some companies ob-

ject to the clause as involving an excessive amount of paper work, it is nevertheless recognized as a basic principle in the business of reinsurance that the ceding company should place no liability upon the reinsuring company that it is unwilling to share."

In Thompson on Reinsurance, Commerce Clearing House, Inc., 1942, page 113, it is stated:

"While excess cover may be used by a re-assured, it ought to inform its reinsurers of any action taken by it in this connection so that reinsurers can always have knowledge of the re-assured's self-retentions under a treaty." (Italics ours)

In the case of *Columbian National Fire Insurance Co. v. Pittsburgh Fire Insurance Co.* (Mich.) 210 N. W. 258, 259, the reinsurance treaty involved was similar to the Treaty involved in the present case. Referring to the obligation of the reinsured company the court said:

"The parties were not dealing at arm's length. Under the contract plaintiff (the reinsured company) occupied a fiduciary position demanding fairness and open disclosure of all reinsurance reducing its agreed retention of risks, and, if its failure to disclose was intentional, it constituted a fraud in the eye of the law." (Italics ours)

See also:

Traill v. Baring (England) 33 Law Journal (Chancery) page 521; 10 Jur. (N.S.) 377; affirmed by the House of Lords on Appeal, 33 Law Journal (Chancery) page 525.

The Appellee, as reinsurer, had a vital interest in

the Appellant's actual net retention on the bridge, giving consideration to *all reinsurance* that was applicable to that bridge, regardless of whether it was pro rata reinsurance or excess of loss reinsurance. *Appellee was just as much injured by Appellant's failure to take into consideration its excess of loss reinsurance as it would have been had Appellant failed to take into consideration its pro rata reinsurance on the bridge.*

(2) Whether We Look to the Terms of the Treaty Alone, or Look Further to the Evidence of Custom and Usage, It is Clear From the Evidence That Appellant Failed to Correctly State Its Net Retention to Appellee.

The District Court after hearing all of the testimony on custom and usage, found in its Finding XVI (Tr. 77-79) that the terms of Article VIII of the Treaty were plain, clear and unambiguous, and did not permit of modification, amendment or interpretation by extrinsic evidence. It is important to note, however, that the Court's Finding XVI did not stop there. The Court further found that in any event, under the customs and usages of the insurance business and in the insurance world, the term "amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company," as used in Article VIII, *does include and does apply to excess of loss reinsurance such as Plaintiff's Exhibit 1, and means what it says*, namely: The amount retained net by the reinsured company at its own risk and liability on the

same property reinsured by the reinsured company with the reinsuring company, after deducting all reinsurance, *including excess of loss reinsurance such as Plaintiff's Exhibit 1.*

In short, the District Court specifically found that, considering all the testimony offered by both parties on the question of custom and usage, the established custom and usage in the insurance business does not support the allegations of Appellant's trial amendment but on the contrary supports Appellee's position in this case.

Pages 18 to 21 of Appellant's brief are devoted to the proposition that "oral testimony is admissible to define the meaning of words used in an agreement where it appears that under the circumstances the words were used in a sense different from their ordinary meaning." The District Court in its Finding XVI finds from the evidence that the words used in Article VIII of the Treaty were *not* used in a sense different from their ordinary meaning (Tr. 77-79).

It is, of course, well established that before a party can successfully introduce evidence of custom and usage to alter, vary, modify or construe a complete written contract, he must first prove by clear and convincing evidence the following facts: (a) That there is an ambiguity in the written contract which requires construction; (b) that there was an established custom bearing upon the point at issue at the time the contract was entered into; and (c) that such established custom was either known to and relied upon by both parties at the time the written contract was

entered into, or the custom was so universal in its application that the courts must conclusively presume that both parties knew of the custom, relied upon it, and acted upon it in entering into the contract.

25 C.J.S., §8, p. 80; §24, p. 112; §33, pp. 126, 128;

Hearn v. New England Mutual Marine Ins. Co., 11 Fed. Cas. 969, 970;

Fidelity & Deposit Company of Maryland v. Washington Life Insurance Co., 193 Fed. 512;

Orient Mutual Insurance Co. v. Wright, 17 L. Ed. 505;

Aetna Insurance Co. v. Sacramento-Stockton S. S. Co. (C.C.A. 9) 273 Fed. 55;

Trans-Atlantic Shipping Co. v. St. Paul Fire & Marine Insurance Co. 9 F.(2d) 720;

Smith v. Providential Savings Life Assurance Society, 65 Fed. 765.

We have noted that Article VIII of the Treaty (Tr. 32) provides that cessions under the Treaty shall in no case and at no time exceed *the amount retained net without reinsurance by the reinsured company at its own risk and liability*. The Appellant seeks to add an amendment to this clause that will read in substance —“*but disregarding excess of loss reinsurance.*”

All of the authorities on reinsurance, and all of the witnesses in this case, agree that an excess of loss reinsurance contract such as Plaintiff's Exhibit 1 (the contract between Appellant Northwestern and Lloyds) is but one kind of reinsurance (Tr. 192, 248, 268, 289, 304, 305, 309, 313, 314).

Plaintiff's Exhibit 1 therefore comes squarely with-

in the term "*without reinsurance*" found in Article VIII of the Treaty (Tr. 32). This meaning of Article VIII is re-enforced, if any re-enforcement were necessary, by the words "*at its own risk and liability.*" It is obvious that, giving effect to Plaintiff's Exhibit 1, all that Appellant retained net on the Tacoma Narrows Bridge *at its own risk and liability* was \$32,000.

How can Appellant possibly argue, with any semblance of logic, that it retained net \$50,000 "*at its own risk and liability*" on the bridge, in view of the fact that Lloyd's, in Plaintiff's Exhibit 1, guaranteed to relieve Appellant of liability to the extent of 90 per cent of any loss on the bridge exceeding \$30,000?

The clear meaning of the *amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property*, is further re-enforced, if any further re-enforcement were necessary, by the fact that the first clause of Article VIII of the Treaty, which specifies the *kind* of insurance or reinsurance *which Appellant may cede to Appellee*, provides that it may be any kind of insurance or reinsurance, without limitation as to class, *excepting excess and catastrophe reinsurance* (Tr. 32). *No such exception, however, is contained in the subsequent clause of Article VIII which defines net retention.*

Thus, even if there were any doubt about the definition of net retention contained in Article VIII, the specific exception of excess of loss reinsurance from the first clause of Article VIII, and the failure to include such an exception in the net retention clause of Article VIII, further demonstrates that no

such exception was intended in the net retention clause.

However, conceding for the sake of argument, that the Appellant was entitled to introduce extrinsic evidence for the purpose of proving, if it could, an established custom or usage sufficient to change, modify or construe the net retention clause, the evidence introduced by the Appellant in this connection was, as the District Court properly found, insufficient to establish such a custom or usage.

The Appellant introduced the testimony of three witnesses in this regard. These witnesses were Mr. Beall, vice president of Appellant, Mr. Sullivan and Mr. Blaise.

Mr. Blaise was asked (Tr. 164):

“Q Will you state to the court what, in insurance language, is meant by the term ‘net retention,’ or, as in this contract, an amount retained net without reinsurance at its own risk and liability on one specific property?”

Over the objection of Appellee, Mr. Blaise was permitted to answer as follows (Tr. 170):

“A The net retention is that amount of liability on a given risk remaining to the account of the primary company after the deduction of all specific reinsurance from the gross line relating to that particular risk.”

During the examination of Mr. Blaise on direct he further testified (Tr. 172):

“Q Is catastrophe excess insurance written on specific losses or not?

A No. They are general covers, applying to all

net retained lines, but not applying to any specific risk."

Nevertheless, on cross-examination, Mr. Blaise was forced to admit that, viewing the situation as of the date Appellant made the cession to Appellee, the highest possible loss which Appellant could sustain, by reason of its insurance on the Tacoma Narrows Bridge, at its own risk and liability as the result of one loss, was \$32,000 (Tr. 180).

During his cross-examination Mr. Blaise further testified (Tr. 180):

"Q On that assumption I am asking you to make, there is no conceivable set of circumstances that could have increased their (Appellant's) liability at their own risk above \$32,000 for loss from one catastrophe on the bridge, is there?"

A No, I think not."

Mr. Blaise further testified (Tr. 182):

"Q And assuming a total loss regardless of the risk?"

A Northwestern would have paid the first \$30,000 and 10% of the balance up to \$50,000.

Q Or, \$32,000?"

A Correct."

Mr. Sullivan was asked by Appellant on direct examination (Tr. 186):

"Q Are you familiar, Mr. Sullivan, with the meaning in the insurance trade of the term 'net retention' as we have used it here in this trial?"

** * * Will you explain to the court what that is?"*

Over the objection of the Appellee Mr. Sullivan was permitted to testify as follows (Tr. 186):

"A Net retention as it is used in the trade

means the amount which a company would retain of the risk for its own account of a policy of insurance which would have been issued for possibly a larger amount, and they may have ceded it off or given off some of the risk to other companies through means of reinsurance."

Mr. Sullivan further testified that the existence of "catastrophe" reinsurance is not, to his knowledge, considered as determining net retention (Tr. 187).

As will clearly appear hereafter, Plaintiff's Exhibit 1, the contract between Appellant and Lloyd's, as applied to the Tacoma Narrows Bridge, was *not* a catastrophe cover, it was *excess of loss reinsurance*.

Mr. Sullivan, in defining what he meant by "catastrophe reinsurance," stated:

"Catastrophe reinsurance covers the whole spread of the company's business. As a matter of fact it is generally thought of as more or less surplus reinsurance. * * * It applies to no particular risk, but applies to the whole spread." (Tr. 187)

Of course, Plaintiff's Exhibit 1 (Tr. 197) *admittedly did apply to the Tacoma Narrows Bridge as a particular risk.*

Further, Mr. Sullivan testified (Tr. 188) :

"The consideration of catastrophe insurance is not applicable because the question of whether or not catastrophe insurance will come into play is not known until the loss is determined."

It is quite clear that Mr. Sullivan based his testimony upon an absolute misconception of Plaintiff's Exhibit 1. Plaintiff's Exhibit 1 did apply to the bridge as a particular risk. Furthermore, Plaintiff's Exhibit

1 had an attachment point (or "first loss retention") of \$30,000, which was below Appellant's warranted net retention of \$50,000. All of the Appellee's witnesses testified, and all of the Appellant's witnesses were forced to admit, that in view of the existence of Plaintiff's Exhibit 1 the highest possible loss which Appellant could sustain in the event of total destruction of the Tacoma Narrows Bridge was \$32,000 (Tr. 111, 147, 160, 180, 182, 193, 246, 266, 302, 328, 329, 335, 338). The fact was readily determinable by Appellant at the time it made the cession to Appellee, and should have been clearly stated in its daily report (Tr. 160, 161).

Mr. Beall, Appellant's vice president, was requested on direct examination "to tell the court the meaning in insurance language, and in the insurance business, of the term 'net retention,' as we have used it here in this trial." He answered: "Net retention refers to the amount of the primary insurance for which the primary company is liable, less the amount of specific reinsurance ceded." (Tr. 213)

It will be appreciated that this type of testimony wherein the witness expresses his understanding of the general term "net retention," in disregard of the detailed and specific definition of net retention contained in the Treaty in suit, is of little, if any, aid to the Court. As will be noted hereafter, definitions of net retention in treaties and reinsurance contracts differ greatly. It would sound the death knell of written contracts if witnesses were permitted to nullify the definitions specifically set forth in those contracts by giving vague, general definitions of their own.

Mr. Beall further testified that possible recovery under *catastrophe* contracts is disregarded in respect to net retention (Tr. 213). He stated (Tr. 214):

“It has no application to an individual risk, but rather it applies only to a catastrophe.” (Tr. 213-14)

Mr. Beall makes the same serious error that all of Appellant’s witnesses make. *He and they persistently ignore the fact that Plaintiff’s Exhibit 1, the contract between Appellant and Lloyd’s, does apply, and always did apply, to the Tacoma Narrows Bridge as a single risk.* This fact is stated and re-emphasized again and again in Plaintiff’s Exhibit 1 (Tr. 259).

The Appellant’s witnesses all persist in referring to Plaintiff’s Exhibit 1 as a *catastrophe cover*, intimating that it is the type of cover which cannot become effective unless there is some widespread, colossal catastrophe, which destroys or damages a large number of separate units or structures over a wide area. They all overlook the fact that Plaintiff’s Exhibit 1 covered a loss to the Tacoma Narrows Bridge as a single unit and risk, even though no other properties were involved.

Furthermore, the Appellant’s testimony as to custom does not, we submit, square with common sense or logic. Custom in any business which would sanction writing a contract in one way and then construing it in an entirely different and inconsistent way, would be absurd on its face.

If the theory advanced by Appellant’s witnesses were correct, then the net retention warranty given by a ceding company to its reinsurer under a Treaty,

such as the Treaty involved here, would become utterly valueless. Under Appellant's theory a direct insurer might retain \$500,000 upon a particular structure, which was not reinsured by pro rata reinsurance, and take out an excess of loss reinsurance contract covering \$499,000 in excess of an ultimate net loss of \$1,000, and then report and warrant to its contributing reinsurer a net retention of \$500,000, whereas its actual net retention would be only \$1,000. Under such circumstances reinsurers would have to ignore the net retention warranty given them by the ceding company and would have to form their own underwriting opinion of each and every risk ceded to them, which would be manifestly impractical, since the reinsurer would not have the information concerning the risk.

It is very significant to note that on cross-examination Mr. Beall, Appellant's vice president, was asked the following question and made the following answer (Tr. 233-234):

"Q Would it make any difference—I will put it another way—assuming that the situation was reversed in this case; that the \$50,000.00 of reinsurance had been ceded by the Union to the Northwestern, and the Union had told the Northwestern it would retain the \$50,000—reversing the parties in the same contract—*would not your company have been concerned* if it found out subsequently to the cession that, although the Union had represented it was retaining \$50,000.00 net, that it had, without your previous knowledge, an excess catastrophe loss policy by virtue of which its top liability on the total loss

of the bridge from a single catastrophe was say \$5,000, *would you be concerned with that?*

A *No, sir.* I am certain every company that cedes us reinsurance has a catastrophe contract which may reduce its loss." (Italics ours)

Mr. Beall further testified as follows (Tr. 234-235):

"Q Assuming a total loss on the Tacoma Narrows Bridge and the Northwestern being the reinsurer, the Northwestern would have to pay \$50,000 in the case of a total loss in one catastrophe, and on the assumed facts I have given you, the Union, by reason of the \$5,000 excess catastrophe policy, would only have to pay \$5,000, would that not concern you?

A *Yes, sir; it would. We could not treat that as catastrophe reinsurance—an excess of \$5,000.*" (Italics ours)

* * * * *

"Q And that \$5,000 maximum would result as \$32,000 does here, from an excess catastrophe reinsurance, and you would be concerned with that difference between your \$50,000 and the Northwestern's \$5,000 on the bridge?

A If it was down to \$5,000 I would be. *Because \$5,000 is lower than the net retention carried by the Union. I would assume they had probably cut their retention on that risk.*" (Italics ours)

And so in the case at bar, *Appellant's excess of loss reinsurance contract with Lloyd's (Plaintiff's Ex. 1) cannot be considered as a catastrophe cover, since the attachment point ("ultimate net loss retention") of \$30,000 is lower than the warranted net retention of \$50,000 stated by Appellant to Appellee.*

On April 1, 1942, Appellee transmitted a letter (De-

fendant's Ex. A-11) to its various pro rata reinsurers, including Appellant, in which it announced a change in its excess of loss reinsurance policy, as follows (Tr. 238):

"As of today, April 1, 1942, our Company has accepted the operation of a new Excess of Loss reinsurance contract whereby on some business outstanding, our net retention shall necessarily be different than entered on daily records corresponding, and also on certificates to your company upon pro rata reinsurance ceded.

"Briefly, our new Excess of Loss reinsurance contract provides for a set minimum net loss retention by the Union of \$4,800.00, each and every loss occurrence (not each and every risk), with an additional 10% loss possibility upon the provisional amount of excess of loss reinsurance.

"Our outstanding pro rata reinsurances with your company should not generally be affected by above new Excess of Loss reinsurance setup; however, we shall appreciate and thank you for your agreement to such setup, by your endorsement of one of the two copies of the enclosed amendment for attachment to reinsurance agreement affected thereby."

Enclosed in this letter to Appellant (Defendant's Ex. A-11) was an instrument entitled "Amendment to Reinsurance Agreement," reading as follows (Tr. 239):

"It is understood and agreed that, effective April 1, 1942, the Union shall have the right to carry Excess of Loss Reinsurance in respect to its own net retention upon risks written, and that, as regards pro rata reinsurances ceded by the Union prior to April 1, 1942, *the advised net*

retained line of the Union on any one risk shall not be considered as being reduced by any amounts recoverable from said Excess of Loss reinsurance." (Italics ours)

It would be expected, of course, that Mr. Beall and his company, in view of their present theory in this case, would have immediately answered Appellee's letter of April 1, 1942, stating that, since excess of loss reinsurance contracts must always be entirely disregarded in determining net retention under a Treaty, Appellant had no objection whatsoever to the change regarding excess of loss, and would therefore gladly sign the enclosed amendment to the reinsurance treaty. *But neither Mr. Beall nor Appellant did anything of the kind.*

On the contrary, on April 13, 1942, Mr. Beall, in behalf of Appellant, wrote Appellee (Defendant's Ex. A-10) stating (Tr. 237):

"I have only just returned to Seattle from a trip to Chicago to attend a specially called meeting of the Federation, and I find our copy of your circular release addressed 'To Our Pro-Rata Reinsuring Companies.'

"Now I want to confer with my associates before giving you our decision. *Frankly, I am much concerned about your new Excess of Loss Contract.* It was my understanding that you formerly carried Excess of Loss or Spread Loss above the first retention of \$15,000.00.

"*I am sure that we have in force many lines of reinsurance where our liability substantially exceeds \$4,800.00. I am not happy about the possibility that we may be called upon to pay a loss of three or four times the net loss to your*

company. I will write you our decision in a short time." (Italics ours)

Appellant on page 24 of its brief contends that Plaintiff's Exhibit 2 (Tr. 125) shows that Appellee in a cession to Appellant, failed to give consideration to a catastrophe cover in stating its net retention. This exhibit contains a detailed schedule describing numerous buildings or risks in five different towns and two other locations. This is "blanket insurance." Upon each of these locations there is set a maximum liability which is less than the attachment point of the catastrophe cover. The catastrophe cover could not have been involved in the loss of any one unit or risk. There would have to be a total loss of all of these properties in a major catastrophe before Appellee's catastrophe cover would apply (Tr. 116-124).

On surrebuttal the Appellee, without waiving its continuing objection to extrinsic evidence on the question of custom and usage, produced the testimony of five experienced and disinterested witnesses who are among the foremost authorities in the United States on the subject of reinsurance. These witnesses were Mr. John D. Pryce, Mr. Frank H. Newman, Mr. Edwin Stewart, Mr. Walter J. Thompson and Mr. John Alden Towers.

These witnesses testified that, under the customs and usages of the insurance business, the term "*amount retained net without reinsurance by the re-insured company at its own risk and liability on the same property*" (the term appearing in Article VIII of the Treaty) means *the maximum amount which the ceding company could lose out of its own pocket in*

the event of a total loss of the insured structure, taking into consideration all reinsurance, including excess of loss reinsurance such as Plaintiff's Exhibit 1. The term means the maximum amount that the ceding company would stand to lose out of its own pocket, without contribution by any other insurer, in the event of a total loss (Tr. 243, 245, 251, 260, 263, 264, 266, 286, 287, 300, 301, 316, 318, 336).

These witnesses further testified that, under the customs and usages of the insurance business, the Appellant in determining and stating its net retention on the Tacoma Narrows Bridge to Appellee was obliged to take into consideration, and make allowance for, its excess of loss reinsurance with Lloyd's (Plaintiff's Ex. 1). (Tr. 245, 264, 286, 301, 313).

In determining net retention the ceding company must always assume that the insured structure may be a total loss, and the determination is made on that basis (Tr. 161, 278, 287, 316, 336).

These witnesses further testified that, under the customs and usages of the insurance business, *the highest possible loss which Appellant could have sustained on the Tacoma Narrows Bridge, taking into consideration Appellant's reinsurance with Lloyd's (Plaintiff's Ex. 1) was \$32,000, not \$50,000, as stated by Appellant* (Tr. 246, 266, 302, 328, 329, 335, 338).

These witnesses further testified that, under the customs and usages of the insurance business, the Lloyd's policy (Plaintiff's Ex. 1), as applied to the bridge, constituted *excess of loss reinsurance* and not a "catastrophe cover," for the obvious reason that the

attachment point ("first loss retention") of the Lloyd's policy (\$30,000) was less than the warranted net retention of Appellant on the bridge (\$50,000) (Tr. 249, 254, 259, 261, 265, 268, 290, 312, 313, 314).

A true catastrophe cover is designed to protect the aggregate of a company's nets, and is customarily in excess of a very sizeable first loss retention, whereas Plaintiff's Exhibit 1 has an unusually low first loss retention for a company the size of Appellant—a *first loss retention which Appellant knew was below the amount ceded to Appellee on the Tacoma Narrows Bridge* (Tr. 252, 253, 261, 265, 310).

These witnesses further testified that, where parties to a reinsurance treaty intend to exclude excess of loss reinsurance from consideration in determining net retention, *they customarily insert a clause specifically so providing in the treaty* (Tr. 251, 287).

These witnesses gave several examples of treaty and contract provisions defining net retention. Some of these provisions provide, as does the Treaty here, that all reinsurance, including excess of loss reinsurance, *must* be considered in determining and stating net retention; others provide specifically that excess of loss reinsurance shall *not be considered* (Tr. 296, 297, 317, 321). *It is always a question of the particular contract* (Tr. 319).

Where, however, the treaty does not specifically exclude excess of loss reinsurance, *it must be considered* by the ceding company in determining and stating its net retention and *must be noted in the cession papers* (Tr. 153, 251).

Mr. John Alden Towers testified that since 1933 his office has issued periodical instructions to insurance companies cautioning them to specifically advise the markets to which they cede reinsurance of the existence of any excess of loss reinsurance, such as Plaintiff's Exhibit 1, which dips down into the net retentions warranted in their cessions (Tr. 324).

Had Appellant fully advised Appellee, at the time of the cession, of Appellant's excess of loss reinsurance (Plaintiff's Ex. 1), Appellee without doubt would have replied to Appellant's request to double its one risk maximum of \$25,000, that Appellee preferred to make no exception in this case and would follow the \$25,000 maximum limitation on cessions provided in the Treaty (Tr. 106, 273, 327-328).

Considering as a whole all of the expert testimony which has been introduced in this case on the meaning in the insurance business of the "*amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property*," as that term and definition is used in Article VIII of the Treaty, it seems to us that all of that testimony, insofar as it refers to this net retention clause, can be summarized as follows:

(1) The definition of net retention in Article VIII speaks for itself. It is couched in plain English. It is clear, definite, certain and unambiguous.

(2) The custom in the insurance business with respect to the interpretation of Article VIII is no different than the custom followed in other walks of life with respect to ordinary commercial contracts—

in other words, the wording of the particular contract governs. When insurance companies enter into reinsurance treaties and make or accept specific cessions of reinsurance, they define in the treaty, or in the application or correspondence covering the specific cession, the net retention that is to be maintained by the ceding company.

(3) When both parties intend that the ceding company may disregard excess of loss reinsurance in computing and stating net retention, the parties specifically so state, in clear and unmistakable terms, either in the treaty or in the papers governing the specific cession. The record in this case contains, as we have seen, examples of treaties and applications for specific reinsurance which specifically provide that excess of loss reinsurance shall be disregarded by the ceding company in computing and stating its net retention, and also examples by the terms of which excess of loss reinsurance must be considered by the ceding company in computing and stating its net retention. In the case at bar the Treaty contains no provision permitting Appellant to disregard its excess of loss reinsurance in computing and stating its warranted net retention.

(4) On the contrary, the parties to this case in their Treaty agreed upon a clear and specific definition of net retention which provides that it is the *amount retained net without reinsurance by the re-insured company at its own risk and liability on the same property.*

It is obvious that the only reason for this lawsuit is the attempt by Appellant to read into this net

retention clause in Article VIII an exception which is not there—an exception, moreover, which is clearly precluded by the very clear terms of Article VIII.

Giving the testimony of Appellant's witnesses all the weight to which it may be entitled, it is obviously insufficient to support the burden of proof which Appellant necessarily assumed when it undertook to prove that there was a universal custom and usage which required interpretation of the Treaty contrary to its terms.

Appellant on page 25 of its brief, referring to the witnesses who testified for Appellee on the question of custom and usage, makes the following statement in italics:

“* * * and not a single one of these witnesses testified that ever in his experience had he ever actually seen net retention computed by taking into account excess insurance of the type of defendant's Exhibit 1.”

In making this assertion Appellant falls into very grave error indeed. The assertion is utterly unjustified. All of these witnesses testified that, under a definition of net retention such as that set forth in Article VIII of the Treaty, the custom and usage in the insurance business is for the ceding company to compute and state its net retention by taking into account excess of loss insurance such as Defendant's Exhibit 1.

Turning to page 250 of the transcript, for example, we find that Mr. John D. Pryce, one of Appellee's witnesses, testified as follows:

“Q When a company cedes a specific amount

of insurance to its reinsuring company, what is the custom in regard to advising that company of their various excess of loss policies?

A May I ask, do you mean under a treaty or a specific risk which is not covered by a treaty?

Q Under a treaty?

A If there is any excess of loss reinsurance covering the risk concerned the ceding company would or should mention the fact. If under a treaty then the treaty should itself state whether or not it is permissible for the ceding company to protect itself by excess of loss reinsurance.

Q Is that advice given on each daily report ceding specific insurance?

A Speaking for my office it is, unless it is under a treaty where such permission exists.

Q I am not referring to your office; I am referring to one insurance company dealing under a treaty with another insurance company?

A I believe it is customary.

Q Did you ever see such a daily report with that information on it?

A Yes I did."

Turning to page 319 of the transcript we find the testimony of Mr. John Alden Towers, a witness for Appellee, relating to various examples of definitions of net retention contained in treaties and contracts, some of them providing that *excess of loss* reinsurance shall be considered in determining net retention, and some of them providing that it shall be disregarded. Mr. Towers further testified as follows (Tr. 321):

"Q Have you in your experience seen daily reports or certificates of reinsurance of the

treaty reinsuring company to its reinsurers specifically mentioning such loss (excess of loss) as affecting net retention?

A I have."

On pages 25 to 28 of its brief, Appellant makes and reiterates a singular contention. Appellant contends that the witnesses for Appellee were inconsistent, in that they stated that, taking into consideration Appellant's excess of loss contract, Plaintiff's Exhibit 1, Appellant's "net retention" under Article VIII of the Treaty was \$32,000, whereas they further stated that Appellant's "ultimate net loss on its net retained lines only," as defined in paragraph VI of Plaintiff's Exhibit 1 was \$50,000. Appellant then remarks (Appellant's Brief, p. 28), that these witnesses indulged in "mathematical legerdemain."

This criticism is utterly without justification. Their is no inconsistency in this testimony. The term "ultimate nett loss of the reinsured company on its nett retained lines only," as used in the Lloyd's policy (Plaintiff's Ex. 1), and the term "*amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property*," as used in Article VIII of the Treaty, are by definition in the documents themselves two entirely separate and distinct things, as the record clearly shows (Tr. 32, 198, 199, 204, 206, 210, 259, 260, 282).

The Lloyd's policy starts paying only when Appellant has first paid or become liable for \$30,000 in one loss. Lloyd's then pays 90% of the excess of Appellant's loss over \$30,000. Obviously Lloyd's, in computing this excess, does not first deduct the amount

it is going to pay. Hence Lloyd's, in the event of total loss of the Tacoma Narrows Bridge, would compute Appellant's total loss as \$50,000, and the excess over the first loss retention as \$20,000.

Appellant closes its brief (page 51) with a series of questions. Appellant states:

"Furthermore, if excess of loss reinsurance such as Plaintiff's Exhibit 1 (Finding XVI, Tr. 79) must be deducted in order to arrive at 'net retention' what sum is to be deducted?"

Appellant then propounds six questions. Only one of these questions merits an answer, namely No. (3), which reads:

Is it "\$18,000, the amount which Appellant would realize on a total loss of this bridge, unconnected with any other loss?"

The answer, of course, is *that Appellant should have deducted \$18,000, the amount it knew it would receive from Lloyd's on the bridge in the event of a total loss.*

From the inception of this controversy until the present time the Appellee's position has consistently been that under Article VIII of the Treaty it was the duty of Appellant in determining its net retention on the Tacoma Narrows Bridge to frankly state its maximum liability with respect to this bridge in the event of a total loss. By virtue of the existence of Plaintiff's Exhibit 1, the maximum amount which Appellant would have to pay out of its own pocket in the event of a total loss of the bridge, was only \$32,000, because it would receive \$18,000 (90 per cent of the excess of \$50,000 over \$30,000) from

Lloyd's under the terms of Plaintiff's Exhibit 1. The Appellant should therefore have notified the Appellee when the cession was made that its net retention under Article VIII was \$32,000.

Furthermore, it is important to note that the maximum amount of Appellant's liability on the bridge in the event of a total loss to the bridge would be \$32,000, *even though the loss of the bridge might be accompanied by the loss of a number of other structures, all insured by Appellant, in the same loss.*

This is well illustrated by the testimony of Mr. Towers (Tr. 333-334). Mr. Towers testified that if on November 7, 1940, a windstorm had totally destroyed the Tacoma Narrows Bridge and had also destroyed at the same time another bridge in the same vicinity, and assuming that Appellant had insured both bridges in the same manner that it insured the Tacoma Narrows Bridge—namely a \$350,000 coverage on each bridge which had been reduced by specific reinsurance to \$50,000 on each bridge—the ultimate loss which Appellant would have had to pay on both bridges would be \$37,000—that is to say, there would have been a total loss of \$100,000, and Lloyd's under the provisions of Plaintiff's Exhibit 1 would have paid 90 per cent of that loss over \$30,000, or \$63,000, and Appellant would have paid out of its own pocket \$30,000, plus 10 per cent of \$70,000 or \$37,000. Since there were two bridges in the assumed case, one-half of Appellant's loss of \$37,000, namely \$18,500, would be allocated by Appellant to each of the two bridges.

If a third bridge, similarly insured by Appellant, were assumed to be totally destroyed at the same

time and in the same windstorm, the loss that would be allocated to each of the three bridges would be \$14,000 (Tr. 333-335).

It is therefore obvious that the following proposition is incontrovertible, namely: *That, taking into consideration Appellant's excess of loss contract (Plaintiff's Ex. 1) \$32,000 was at all times Appellant's absolute top liability (i. e. net retention) in the event of total destruction of the Tacoma Narrows Bridge; and this proposition holds true even though we assume that one or more additional bridges or structures might likewise be totally destroyed in the same loss.*

The remaining five questions which Appellant presents on page 51 of its brief have nothing whatsoever to do with the point at issue or with this case, and are merely thrown in to suggest confusion on a point where no confusion whatever actually exists.

For instance in question No. (1) Appellant asks whether, in determining net retention under Article VIII of the Treaty, we should deduct "\$153,000, the maximum amount of the excess insurance." In other words, Appellant is asking whether \$153,000 should be deducted from \$50,000. The question is absurd and the answer is of course "no." The answer to the remaining four questions, which are equally absurd, is also emphatically "no."

All of these questions, with the single exception of question No. (3), are purely arguments in the form of questions, but they are patently fallacious arguments having no relevancy to the issue, and constitute, we submit, unjustified criticism of the District Court's Finding XVI (Tr. 79).

(3) The Evidence Establishes That Appellee Had No Notice or Knowledge of the Appellant's Failure to Correctly State Its Net Retention Until After the Loss of the Tacoma Narrows Bridge.

As we have heretofore noted, Appellant failed to advise Appellee of Appellant's actual net retention (\$32,000) on the Tacoma Narrows Bridge until a date subsequent to the loss of the bridge. It was on August 25, 1941, that Appellee received the first intimation that Appellant's net retention was less than \$50,000 as warranted (See Defendant's Ex. A-6, Tr. 104-105).

Clearly Appellant, which was at all times under the legal obligation to exercise the highest good faith toward Appellee, cannot offer any valid excuse for its failure to correctly state its net retention when it made the cession to Appellee, or for its failure to advise Appellee at the time of the cession that its actual net retention was \$32,000.

At the trial Appellant made what is, in our opinion, a very strained effort to excuse its failure in this regard by contending—and offering some evidence in support of the contention—that Appellee, despite Appellant's failure in this regard, might have advised itself through other sources of the existence of Plaintiff's Exhibit 1, and of Appellant's actual net retention on the Tacoma Narrows Bridge under Article VIII of the Treaty. Appellant stresses this contention on pages 43 to 49 of its brief on this appeal.

Appellant mentions three sources from which it argues this information might have been obtained by Appellee: (1) From a conversation in 1928 between

Mr. Beall and Mr. Easton, a former officer of Appellee; (2) From a statistical publication called "Best's Reports," and (3) From official reports covering Appellant and its business on file with the Insurance Commissioner of the State of Washington.

① Let us consider first the conversation with Mr. Easton. Mr. Beall, Appellant's vice president, testified that in the year 1928, twelve years prior to the execution of the treaty involved in this suit, he had a conversation with Mr. Easton, at that time an officer of Appellee, but since retired (Tr. 225). Mr. Beall stated the conversation took place in Milwaukee at an insurance convention, and that he and Mr. Easton had a discussion of their underwriting programs and their theories along this line, and of reinsurance which each company carried (Tr. 226-228). In other words, Mr. Beall and Mr. Easton had a general conversation concerning their underwriting programs and their reinsurance programs as they existed in 1928, twelve years prior to the execution of the Treaty in suit, and twelve years prior to the cession by Appellant to Appellee of the reinsurance on the Tacoma Narrows Bridge.

To us it seems incredible that a company occupying the fiducial relationship Appellant occupied, could seriously offer this vaguely remembered, twelve-year-old conversation at a convention as a valid reason for Appellant's failure to comply in good faith with Article VIII of the Treaty of January 1, 1940.

② Let us next consider Best's Reports. Best's Reports is a privately published statistical publication. At the

trial counsel for Appellant interrogated Mr. Legris, Appellant's assistant secretary, concerning a particular volume of Best's Reports, which applied to annual statements furnished by insurance companies as of December 31, 1939, but which was not issued by Best's Publications until May of 1940 (Tr. 140). Counsel for Appellant referred to page 991 of that volume, which recited that Appellant had very satisfactory arrangements under reinsurance treaties for reinsuring excess lines, besides carrying a first excess catastrophe coverage for \$200,000 applicable to all hazards in excess of \$30,000, and a second excess over \$250,000 up to \$500,000 (Tr. 138).

The practice of the Best's management in securing data for the Reports, is to send out to the companies each year a request for the information that is published. The companies furnish Best's management with a copy of their annual statements and send additional information on forms submitted by Best's. In each case it is the company itself which writes out the script and sends it to Best's management, and Best's management for the most part publishes what each company sends it (Tr. 151-153, 271-272).

A reinsuring company, such as Appellant^{ee}, in passing upon the question of whether it will accept a particular cession of reinsurance, does not consider Best's Reports at all (Tr. 136, 153, 272, 306, 331-332). Neither Best's nor any other publication is authoritative in this connection (Tr. 27). The reinsuring company analyzes the proposed cession of reinsurance on the face of the information contained in the particular binder, daily report or certificate of rein-

surance, and if everything is correct on the face of those papers, in the judgment of the underwriting department of the reinsuring company, the cession is approved (Tr. 136, 153, 272, 306).

Mr. John Alden Towers testified that Best's Reports are not used in considering cessions; that there are other books similar to Best's, namely, The Spectator, The Argus Field, and The Weekly Underwriter; that these publications could not be used for cessions, because it is presumed that companies dealing between themselves know more about the position of each company than Best's would know, and that, under the customs and usages of the insurance business, reinsurance is placed as provided in the treaty contract and in accordance with a cession or binder notice, daily reports, or bordereaus (monthly reports in writing). (Tr. 331-332). Furthermore, as noted, Best's 1939 Reports did not come out until May of 1940. Therefore, the information contained in that book was cold and too old to be of any use when Appellant made its cession of reinsurance to Appellee, which is a further reason why Best's obviously would not be referred to for purposes of reinsurance, but only for names and initials of officers, titles of companies, addresses, and annual statement figures for the preceding year.

If ceding companies, owing the legal duty of the highest good faith to their reinsurers, could avoid their legal obligation to make full and frank disclosures on their daily reports or other papers by which the cessions are made, by offering excuses such as Appellant offers here, then reinsurance treaties would

become utterly worthless, and reinsurers would have to maintain an espionage department to check and sift chance conversations at conventions, magazines, periodicals, newspapers and street rumors from day to day during the entire life of the reinsurance treaty.

For the Appellant to have relied upon the happenstance that the company to which it was ceding \$50,000 of reinsurance might perhaps delve into independent statistical publications or chance conversations between individuals and accidentally discover for itself what Appellant's actual net retention on the bridge was, would be a strange way indeed for a ceding company to fulfill its obligation of the highest good faith, particularly when we consider that Appellant at the time it made the cession could have very easily and very briefly stated the facts to which Appellee was entitled.

Let us turn now to the third excuse given by Appellant for not complying with its obligation to state its actual net retention and to fully advise Appellee of the existence and effect of Plaintiff's Exhibit 1. The third excuse is that Appellee could have secured this information by examining the official insurance reports covering Appellant on file with the Insurance Commissioner of the State of Washington.

Mr. Sullivan, a witness called by Appellant, testified (Tr. 190, 194) that he was familiar with the examinations made of domestic insurance companies by the Insurance Department of the State of Washington, having served in that department for nine years. Mr. Sullivan testified that in the State of Washington

these examinations were made annually; that every three years there was an examination made under the auspices of the National Insurance Commissioners' Association by examiners from outside states who were invited to participate with the Washington examiners. He further very positively testified that these examination reports revealed the existence of the catastrophe policies and the *amounts of reinsurances and risks* carried by the domestic companies and *explained them rather fully, summarizing their terms and giving their limits* (Tr. 190, 194).

Now, then, *what are the facts in this regard?*

Appellee in surrebuttal introduced in evidence the following very important exhibits (Tr. 360-363, 396-402): (1) *Defendant's Ex. A-14*, an exemplified copy of the entire report of examination of Appellant by the National Association of Insurance Commissioners, dated December 31, 1938; (2) *Defendant's Ex. A-15*, an exemplified copy of the entire report of examination of Appellant by the Insurance Commissioner of Washington, dated December 31, 1939; and (3) *Defendant's Ex. A-16*, an exemplified copy of the entire report of examination of Appellant by the Insurance Commissioner of Washington, dated December 31, 1940.

The originals of these three exhibits have been transmitted to and filed with this Court by order of the District Court. *These three exhibits speak for themselves and conclusively establish that Mr. Sullivan's testimony regarding these reports was utterly without basis. There is not a single word in any of these bulky reports "explaining" the excess of loss*

contracts or catastrophe covers of Appellant; and there is not a single word in any of these exhibits which states or "summarizes" the terms or gives the limits of these excess of loss contracts or catastrophe covers.

So much for Appellant's efforts to excuse its failure to comply with Article VIII of the Treaty. There is a plain answer to these excuses which Appellant offers, and that answer is this: A fiduciary cannot avoid its obligations by such specious arguments as these; that Appellant's obligation was *to speak out—to speak out immediately in clear and unmistakable terms*—regarding the true amount of its net retention on the Tacoma Narrows Bridge; and that, having failed to do so, it cannot now object to adjustment of Appellee's liability under Article XIV of the Treaty.

*"The parties were not dealing at arm's length. Under the contract Plaintiff occupied a fiduciary position demanding fairness and open disclosure of all reinsurance reducing its agreed retention of risks." * * **

Columbia National Fire Ins. Co. v. Pittsburgh Fire Ins. Co. (Mich.) 210 N.W. 258.

*"While excess cover may be used by a reassured, it ought to inform its reinsurers of any action taken by it in this connection, so that reinsurers can always have knowledge of the reassured's self-retentions under a treaty * * *."*

Thompson on Reinsurance, page 113.

In view of the Treaty, Appellee had an absolute legal right to reply upon, and to assume the correctness of, the net retention as stated and warranted by Appellant in its cession to Appellee.

Appellee was not obligated in any way to go beyond the daily report and wires (Tr. 92-94) which effected this cession and make an independent search to see if perchance it might discover through outside sources that Appellant's solemn written warranty was not true, and that Appellant might perhaps be withholding material information.

Not only was Appellee not legally obligated to do this, but such a practice would obviously be an impossibility in the practical operation of the reinsurance business. In view of the vast amount of reinsurance written, covering all the states of the Union, and the vast amount of detail involved, the reinsurer must necessarily rely upon the good faith of the ceding company and the correctness and completeness of its written statements and warranties.

The established custom is for the reinsured to accept on its face the information and net retention stated by the ceding company on its cession papers (Tr. 136, 153, 258, 306).

(4) Appellant's "Two-risk" Theory and Its Contention Regarding "P. M. L." Are Clearly Contrary to the Preponderance of the Evidence.

Appellant at the trial, and in the brief which it has filed in this Court, makes another contention. (See pages 35 to 42 of Appellant's brief). Appellant contends that when it wrote the insurance on the Tacoma Narrows Bridge it concluded that the bridge constituted "two risks" (Tr. 222). Appellant contends in effect, that when it made the \$50,000 cession of reinsurance to Appellee, its intention was to cede

to Appellee \$25,000 on each of the two alleged separate risks, and that, since the attachment point of the Lloyd's policy (Plaintiff's Ex. 1) was higher than \$25,000, Appellant did not violate Article VIII of the Treaty in failing to consider plaintiff's Exhibit 1, when it computed and advised Appellee that its net retention under Article VIII was \$50,000.

Mr. Beall testified (Tr. 222):

"Q How many risks did you underwrite the bridge as?

A As two risks."

The basic fallacy inherent in this "two-risk" theory is that it entirely fails to meet the real issue presented by Appellee's answer in this case (Tr. 58). Appellant is suing to recover upon a particular written contract—the Treaty of January 1, 1940—(Tr. 28), a contract which is clear, definite and complete on its face. Appellant is therefore *bound* by the terms of that contract.

That contract, in Article VIII, very clearly states that Appellant in making the cession of reinsurance to Appellee shall not cede more than *the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property*. That means, in the present case, that Appellant was forbidden by the Treaty to cede to Appellee more than the amount which it retained net at its own risk and liability on one particular structure, constituting a single, component unit, namely, *the Tacoma Narrows Bridge*. (1)

It is clearly established by the evidence that, contrary to Appellant's warranty, all that Appellant re-

tained net without reinsurance at its own risk and liability on the same property, that is, on the Tacoma Narrows Bridge, was \$32,000 (Tr. 111, 147, 160, 180, 193, 246, 266, 302, 328, 329, 335, 338).

The very clear meaning of Article VIII is that Appellant must retain an "equal stake" with Appellee, "*on the same property reinsured by the said reinsured company with the reinsuring company.*"

If Appellant cedes \$50,000 to Appellee on the bridge as a single, component unit then it must necessarily retain \$50,000 at its own risk and liability *on the same property*—that is—*on the bridge, as a single, component unit*. For Appellant to now say, as it does in its hair-splitting "two-risk" theory, that what it really did, or meant to do, was to theoretically divide this single-span, suspension bridge into two undefinable parts, and cede Appellee \$25,000 on each of these undefinable and inseparable parts, just as though they were two entirely separate structures located miles apart, is clearly beside the issue.

Appellant, in advancing this "two-risk" theory disregards Article VIII of the Treaty, which is the contract it is suing on. Appellant disregards the positive mandate of Article VIII that it must retain the identical amount that it cedes *on the same property, i. e., on the Tacoma Narrows Bridge as one unit*. Appellant ceded \$50,000 *on the bridge as one unit*; therefore, it had to retain \$50,000 at its own risk and liability *on the bridge as one unit*. This it did not do.

According to Appellant's "two-risk" argument, it could have ceded to Appellee with perfect propriety, under Article VIII, \$75,000 on the bridge as one unit,

warranting to Appellee that it was itself retaining net, *on the same property as one unit*, without reinsurance, "*identical \$75,000*," and could then reinsure, on an excess of loss basis, all but \$25,000 of the \$75,000, on the theory that the bridge in Appellant's mind constituted three undefinable risks, each representing \$25,000.

Of course, in such a case, Appellee would stand to lose \$75,000 in the event of total loss of the bridge, whereas Appellant would stand to lose only \$25,000. Yet, according to Appellant's argument, this would all be perfectly proper because Appellant in its own mind concluded (but did not disclose to Appellee) that there were "three risks."

Likewise, the "two-risk" theory is contrary to all that Appellant has said and done prior to the loss of the Tacoma Narrows Bridge. The two-risk theory is but another attempt by Appellant to amend and modify by extrinsic evidence, the very clear written record it has made—a written record which squarely refutes its present theory.

In view of this two-risk contention, let us re-examine for a moment Defendant's Exhibit A-5 (Tr. 94), which is the instrument (Daily Report No. 10852) by which Appellant ceded to Appellee the \$50,000 of reinsurance on the bridge.

Does Defendant's Exhibit A-5, which was transmitted by Appellant to Appellee in June, 1940, state or indicate in any way that Appellant has concluded that the Tacoma Narrows Bridge constituted two separate risks? The answer is emphatically "no."

Does Defendant's Exhibit A-5 state or indicate in any way that Appellant is ceding to Appellee a maximum of \$25,000 on each of two separate risks? The answer is again emphatically "no."

On the contrary, Defendant's Exhibit A-5 merely states that Appellant is ceding to Appellee \$50,000 of reinsurance *on the Tacoma Narrows Bridge and approaches*, and that Appellant is retaining "*identical \$50,000.*"

There is certainly nothing ambiguous about "*identical \$50,000,*" and it does violence to all rules of reason and logic for Appellant now to contend that by virtue of its present two-risk theory it had a right to retain net only \$32,000, in the face of its express warranty to Appellee that it was retaining net "*identical \$50,000.*" There can be no two interpretations of the word "*identical,*" the only net retention that could be identical with \$50,000 is \$50,000.

No matter what Appellant and its witnesses may now say, with respect to any thought or intention that Appellant and its agents may have had in the inner recesses of their minds as to whether the bridge constituted one risk or two risks, the indisputable fact is that Appellant's cession to Appellee must be determined *on the face of Defendant's Exhibit A-5 itself.*

Defendant's Ex. A-5 (Tr. 94) constitutes the cession; and no undisclosed thoughts or intentions that existed, if they did exist, in the mind of Appellant, can in any way change or alter that instrument.

Furthermore, it seems clear from the record that

Appellant's present contention that it ceded to Appellee \$25,000 of reinsurance on each of two separate risks, is purely an afterthought.

An examination of the Treaty will show that Appellant had an absolute right to cede reinsurance on the Tacoma Narrows Bridge to Appellee, without asking for or securing Appellee's special consent in advance, provided of course that Appellant strictly complied with Article VIII of the Treaty. *Therefore, if Appellant's present two-risk theory of the cession had been in its mind at the time the cession was made, there would have been no reason in the world why Appellant should have written Appellee requesting its special consent in advance to the cession of \$50,000.*

Yet we find that on May 31, 1940, Appellant wrote a letter to Appellee asking it to give its advance consent to the proposed cession of \$50,000 (Tr. 40).

Not content with this letter, Appellant on June 10, 1940, sent a wire to Appellee (Defendant's Ex. A-1, Tr. 92), asking Appellee to answer Appellant's letter of May 31 and to wire authorization of the proposed cession. This wire contains the clear, concise statement "*we will retain \$50,000.*" Nothing whatever is said in the wire indicating that Appellant at that time had in mind its present theory that it intended to cede to Appellee \$25,000 on each of two separate risks.

On June 11, 1940, Appellee wired Appellant (Defendant's Ex. A-3, Tr. 93) authorizing cession of \$50,000.

It is, of course, obvious that there was but one possible reason for Appellant asking, as it did, in the

above mentioned letter and wire for Appellee's special consent in advance to the cession of \$50,000—and that reason was that Appellant was ceding Appellee \$50,000 on one risk, and in as much as that cession was twice as much as the \$25,000 top limit for a one-risk cession, prescribed in Article VIII of the Treaty, Appellant knew that it had to secure Appellee's special consent in advance.

This is conclusively established by Appellant's letter of December 29, 1941, to Appellee, where Appellant states (Tr. 43, 44):

"However, we note in Article VIII of the Reinsurance Agreement that *the limit of each risk is expressly subject to the exception of 'specific cases subject to the approval of the reinsuring company.'* The files in this case disclose that the association on May 31, 1940, sent to each of their various reinsurers, among which was your company, a circular specifically describing this bridge as a single span suspension bridge. They received numerous specific authorizations from various reinsurers, but not having received any from you, on June 10, 1940, they sent a telegram to you, in which they asked that you *'please wire your authorization.'* You replied to this telegram by specific authorization of \$50,000, following it up by a letter of confirmation.

"We would therefore earnestly urge upon you their cession to you of \$50,000 reinsurance *clearly comes within the exception of a specific case subject to your approval.*" (Italics ours)

It will be noted that the District Court in its Findings of Fact VI (Tr. 69) found:

"That, in as much as the maximum amount

which the plaintiff could cede to the defendant on one risk under Article VIII of the Treaty was \$25,000, and since the plaintiff desired to cede to the defendant more than said maximum amount of reinsurance on the Tacoma Narrows Bridge, plaintiff on June 10, 1940, wired the defendant asking for specific authorization to do so."

The District Court in its Findings VIII (Tr. 70) finds:

"That said cession by the plaintiff to the defendant was a cession of \$50,000 of reinsurance upon the Tacoma Narrows Bridge and approaches as one unit and risk, the single-risk maximum of \$25,000, designated by Article VIII of said Treaty, being increased to \$50,000 by the above mentioned specific authorization and approval of the defendant, pursuant to and in accordance with the provisions of Article VIII of said Treaty permitting this to be done in specific cases subject to the approval of defendant. That the court finds said reinsurance was not ceded to the defendant upon a two-risk or multiple-risk basis, but, on the contrary, was ceded on a one-risk basis."

The Appellant did not produce at the trial any contemporaneous record or written evidence supporting its claim that in June, 1940, it underwrote the bridge as "two risks."

Moreover, if Appellant's two-risk theory is not an afterthought, *why did not Appellant immediately and forcefully advance this two-risk argument when replying to Appellee's letter of September 8, 1941 (Defendant's Ex. A-7, Tr. 96), wherein Appellee asks why Appellant in its proof of loss had stated that its*

net loss was \$38,461.54 "*prior to excess?*" Appellant then knew that it was being called to task by Appellee for not properly stating its net retention. The most natural thing in the world, if Appellant had then had the two-risk theory in mind, would have been to immediately write to Appellee stating clearly and emphatically, "We underwrote the bridge on a two-risk basis; we ceded to you \$25,000 on each of two separate risks; and therefore, our excess of loss re-insurance does not apply to our net retention." Appellant, however, in replying to Appellee's letter of September 8, 1941, *made no such statement*. On October 1, 1941, Appellant by letter answered Appellee's letter of September 8 and it *said nothing whatsoever about its present two-risk theory* (See Defendant's Ex. A-8, Tr. 97).

Again on October 15, 1941, Appellant wrote Appellee endeavoring to explain why it had not considered its excess of loss policy in determining its net retention (Tr. 49-51). Again Appellant had an opportunity, if it had then had the two-risk theory in mind, to speak out clearly and tell Appellee about it in clear and unequivocal terms. *It did not do so*. On the contrary, the terms of the letter clearly negative any possible two-risk theory, because the letter states among other things (See Appellant's Admission, Tr. 49, 50):

"In the *ordinary case*, of course, the question would never arise in any event *since the amount we would retain net on one risk would be considerably less than the \$30,000 limit in our excess catastrophe contract*. * * * *We ceded to you \$50,000 on your specific authorization*, and it is our

conscientious opinion that your payment should be predicated on that amount, and should not be influenced by the existence of our catastrophe excess contract." (*Italics ours*)

Furthermore, how can a single-span suspension bridge of this type be reasonably or logically considered as "two separate risks?" It is obvious that if one pier collapsed it would most certainly collapse the entire bridge. Except for the approaches, which constituted only about 2% of the total value of the bridge, the bridge was all clearly subject to loss from one and the same occurrence, whether due to windstorm, collapse or other causes, all covered by Appellant's policy on the bridge (See Defendant's Ex. A-8, Tr. 97).

Mr. Beall, Appellant's vice president, was asked on cross examination to give his segregation or description of the alleged "two risks" and he was utterly unable to do so (Tr. 232).

As Mr. Towers testified: "*You cannot make black out of white.*" The entire bridge constituted one component structure and one risk; and was ceded by Appellant to Appellee as one risk by Daily Report No. 10852 (Defendant's Ex. A-5, Tr. 94).

"*Single risk,*" as Mr. Towers testified, has been defined by stating what constitutes more than one risk, i.e.; "*two properties unlikely to be affected in the same occurrence would be considered as more than one risk*" (Tr. 345).

The National Federation of Mutual Fire Insurance Companies in its Bulletin, Vol. 21, No. 2, transmitted to its various members, including Appellant, contains

an authoratitive definition, from a consensus of opinion source, of the term "*one risk*" as follows (Tr. 358):

"*'The same risk'* refers to one fire area *and not to the probable maximum loss*. For instance, the probable maximum loss on a fire resistive building might be 50%, but the building might still be all in one fire area. In such a case the building would constitute *one risk*." (Italics ours)

By the same token the Tacoma Narrows Bridge constituted one risk, and that is why the reinsurance covering it was ceded as one risk by Appellant in Daily Report No. 10852 (Defendant's Ex. A-5, Tr. 94).

Mr. Towers testified:

"My answer is that you cannot make black out of white, and that even though the ceding company is the sole judge of what constitutes one risk, that does not give it the right to cede what would be customarily called one risk as two risks; and the fact that the ceding company wired for permission to exceed the limit named in the Treaty of \$25,000, indicates quite strongly that the ceding company realized most underwriters would consider this one risk." (Tr. 348)

The Appellant, apparently realizing the weakness of its two-risk theory, contends that the term "P. M. L.," which means "probable maximum loss," as used in its daily report No. 10852 (Defendant's Ex. A-5, Tr. 94), was a symbolic declaration to Appellee that Appellant had underwritten the bridge on a two-risk basis and was therefore in effect ceding to Appellee \$25,000 on each of two separate risks.

In support of this contention Appellant at the trial undertook the burden of proving, over Appellee's continuing objection, that it was the universal custom known to all insurance companies to use the "P.M.L." designation to indicate the number of risks, and that therefore the Court should read into Appellant's daily report (Defendant's Ex. A-5) some such declaration as this: "Northwestern finds that the bridge constitutes two risks, and therefore cedes to Union under the treaty \$25,000 on each of said risks."

Appellant's witnesses testified that they had followed such a practice, but the witnesses called by the Appellee, Messrs. Legris, Pryce, Newman, Stewart, Thompson and Towers, all outstanding men of wide experience in the reinsurance business, testified positively and emphatically that there was no such custom and usage (Tr. 107, 116, 135, 247, 266-7, 288, 302-3, 329-30).

Here again, the burden of proof was squarely upon Appellant to prove by a preponderance of the evidence that there was a custom to this effect, and that the custom was so universal that the Court must conclusively presume that it was known to both parties and actually relied upon by them.

It is a significant fact that Appellant found it necessary, in order to pursue its cause of action in this case, to attempt to rewrite not only the Treaty (Tr. 28), but also its daily report No. 10852 (Defendant's Ex. A-5, Tr. 94). This becomes all the more significant when we consider that Appellant's lawsuit is squarely based on the very instruments which it now seeks to rewrite.

These witnesses testified that, under the customs and usages of the insurance business, the designation "P.M.L." followed by a percentage figure, refers to the *quality* of the risk and means the "probable maximum loss" in the opinion of the underwriter on a particular cession. The designation may apply to one risk or to more than one risk. Two identical, single-risk structures may have entirely different P.M.L. designations based upon differences in location, fire protection facilities, etc. The designation indicates the maximum "damageability" of the risk from the peril insured against (Tr. 107, 116, 135, 247, 266, 288, 302, 329).

Under the customs and usages of the insurance business the "P.M.L." designation is not used to indicate the number of risks involved in a particular cession of reinsurance (Tr. 107, 116, 135, 247, 266, 288, 302, 329).

According to the National Federation of Mutual Fire Insurance Companies: "*The same risk*" refers to one fire area *and not to the probable maximum loss*" (Tr. 358).

These witnesses further testified that, under the customs and usages of the insurance business, ceding companies, under reinsurance treaties, customarily indicate the number of risks involved, where there are more than one, by making separate cessions (Tr. 116, 248, 267, 331).

Where, however, two or more risks are included in one cession the ceding company lists or describes the several risks in the cession papers or bordereau (Tr. 116, 248, 267, 289, 303).

If, as Appellant undertook the burden of proving, it is the universal custom and usage in the insurance business, for ceding companies to employ the term "P.M.L." to designate the number of risks, is it conceivable that outstanding authorities with years of experience in the insurance business, such as Messrs. Pryce, Newman, Stewart, Thompson and Towers, who have handled thousands of cessions and hundreds of treaties over a long period of years—and all of whom are entirely disinterested—could have had no single experience where "P.M.L." was used to designate the number of risks?

Appellant has clearly failed to introduce sufficient evidence on this point to prove by a preponderance of the evidence that its alleged custom with respect to the use of P.M.L. actually existed, and was so universal that the Court must now conclusively presume that both Appellant and Appellee knew of it, relied upon it, and acted with reference to it.

Mr. Beall, Appellant's Vice President, on cross examination testified that the caption "P.M.L." appearing upon Daily Report 10852 (Defendant's Ex. A-5) indicates that there is more than one risk involved; that 50% P.M.L. would indicate two risks, 33 1/3% three risks and 25% four risks (Tr. 229, 232). Such is the yardstick which Mr. Beall states his company uses in stating P.M.L. By the same token it would necessarily follow that five risks carried a P.M.L. designation of 20 per cent—ten risks 10 per cent, etc.

If we turn, however, to Defendant's Exhibit A-17 (Tr. 364), the group of eleven daily reports wherein Appellant ceded reinsurance to Appellee, we find that

they do not square with Mr. Beall's testimony mentioned above.

For instance, in Daily Report 9108, contained in that exhibit, the P.M.L. was stated to be 33 per cent, although the cession covered seventeen separate items or risks. If the above mentioned testimony of Mr. Beall were correct, then the P.M.L. should have been stated at 5.9 per cent, instead of 33 per cent.

Take for another example, Appellant's Daily Report 13486 appearing in the same exhibit. In this report the P.M.L. was stated to be 60 per cent, yet the report covered twenty-one separate locations or risks in sixteen towns. If Mr. Beall's testimony were correct, then the P.M.L. should have been stated as 4.5 per cent instead of 60 per cent.

If a custom and usage regarding P.M.L., such as Appellant now contends for, could be conceived of, even as a possibility (the evidence clearly shows that it does not exist as a matter of fact), it would manifestly be an unreasonable custom. Its very unreasonableness on its face is the best argument against the possibility of its existence. It simply does not appeal to our common sense or sense of justice to say that a ceding company, in view of its obligation of the highest good faith, can escape its legal obligation, as a fiduciary, to make a full disclosure of all material facts (one of the most important of which is the number of risks involved, if more than one) by clinging to this slender straw of P.M.L., when it would have been such an exceedingly simple matter for Appellant to have plainly and frankly said in its daily report in a single, short sentence: "Bridge un-

derwritten as two separate risks of \$25,000 each; and \$25,000 is ceded on each risk."

"A fundamental rule of reinsurance, * * * the foundation of reinsurance, is—

"(1) Full information, so far as possessed by the ceding company, as to the risk on which the reinsurance is requested. * * *."

Golding, "The Law and Practice of Reinsurance," p. 14.

We respectfully submit that the Findings, Conclusions and Judgment of the District Court are clearly supported by the great preponderance of the evidence in this case; and that the Judgment should be affirmed.

Respectfully submitted,

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWESTERN MUTUAL FIRE ASSOCIATION,
a corporation, *Appellant,*

vs.

UNION MUTUAL FIRE INSURANCE COMPANY
OF PROVIDENCE, RHODE ISLAND, a
corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF

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FILED

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PANY OF PROVIDENCE, RHODE ISLAND,
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Appellee.

No. 10584

UPON APPEAL FROM THE DISTRICT COURT OF THE
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APPELLANT'S REPLY BRIEF

A. APPELLEE'S STATEMENT OF THE CASE

Appellee's Brief seems to rely chiefly upon a continuous reiteration of the idea that Appellant's "net retention" was only \$32,000 which is repeated over and over again and is necessarily based upon the assumption that the proper amount for calculating the deduction to be made from the gross amount of insurance on account of the existence of catastrophe excess reinsurance is the amount which the reinsured *would recover in the event of a total loss from one single cause*. This idea is repeated over and over again in all possible variations and reference is made over and over again to the testimony of Appellee's witnesses, which was drawn out from these witnesses

by reason of questions which contained these two elements of the problem for which, as we show, there is absolutely no justification.

Furthermore, Appellee's Counsel throughout the brief consistently refused to consider the fact that this catastrophe excess of loss reinsurance covers Appellant's entire business, and there is absolutely no reason for allocating any part of it to one specific property! That is to say, if the maximum amount of protection which the Appellant might receive from this catastrophe reinsurance is to be considered, that amount is \$153,000. Between that amount and the amount which they would recover in the event of a loss of but \$30,000 (which is nothing) there is absolutely no reason why any figure should be read into this contract.

With these general observations as to Appellee's repetitions of arguments, absolutely without any foundation either in the contract in question or the evidence, we can mention only a few of the more obvious misstatements of fact contained in Appellee's Brief.

B. THE FORCE OF THE DISTRICT COURT'S "FINDINGS OF FACT"

We have no complaint to make against the rule of law set forth in Appellee's Brief, page 14, but we respectfully submit that district courts are not given the power to make what are actually erroneous conclusions of law and by dubbing them findings of fact prevent the Appellate Court from re-examining them. The issues which the Appellant presented in this case were very simple. They were as set out in our summary on page 17 of our opening brief and thereafter

argued. In support of these claims, we challenged counsel for the Appellee to point out any evidence in the record that contradicted these claims; and after reading Appellee's Brief, we most certainly submit that they have not met that challenge. This is not a case of dispute as to the facts, as were all of the cases cited by Appellee's Counsel, but is a case where, as we will show, the evidence on the essential facts is uncontradicted.

C. APPELLANT OBSERVED THE UTMOST GOOD FAITH IN CORRECTLY STATING ITS ACTUAL NET RETENTION TO APPELLEE.

We do not question but what reinsurance, like all other executory contracts, is a matter of the utmost good faith, and we do not question but what it is a very proper action for the reinsured to inform the reinsurer prior to the making of a reinsurance contract of the existence of any excess of loss reinsurance, but our answer to this claim is that the appellant did so (See pp. 43 *et seq.* of our opening brief).

D. EVIDENCE OF USAGE WAS ADMISSIBLE

We note on pages 19 and 20 of Appellee's Brief an apparent claim that because the District Court found that the terms of Article VIII of the treaty were "plain, clear and unambiguous" that should be taken as a finding of fact. Most certainly, if a jury had been present, the court would not have instructed the jury to determine for itself whether or not the term "net retention" was "plain, clear and unambiguous" as the construction of a contract is always a question of law for the court. The question of fact consists in

whether or not there is a usage which gives to a term a certain definite meaning which might not be detected by any person who is unfamiliar with such usage.

We respectfully submit that under the law as set out on pages 18 to 21 of our Opening Brief, evidence of the usage which we alleged in our amendment (Tr. 165) was admissible. We note that counsel for the Appellee insist that one of the elements of a usage which must be proven is that "there is an ambiguity in the written contract which requires construction." In preparing our Opening Brief, we intentionally omitted all reference to the law with respect to explaining ambiguous terms, but, for the sake of brevity and conciseness, confined our statement of principles of law to the rule applicable to cases where the term to be defined would ordinarily be given a different meaning from that given to it by the usage.

Taking up the law cited by counsel for the appellant, we are much surprised to find first the citation of §24 p. 112 of 25 C.J.S. We quoted that paragraph in full at the bottom of page 20 of our Opening Brief and therefore pass it by merely calling the Court's attention to the last clause "even though the words are unambiguous in their ordinary sense." §8 of 25 C.J.S. is merely a statement of the necessity and sufficiency of the custom and usage and §33 merely states the rules as to burden and order of proof, the admissibility of evidence and the weight and sufficiency of evidence. The real answer to the question involved in this case is contained in §24, which is as we have above stated.

In all of the cases cited in the Appellee's Brief, page 21, the question involved was the admissibility of evidence of a custom which was directly contrary to some specific provision contained in the contract and in these cases the question of the admissibility of a definition by usage of a certain particular term as used in the contract was not involved. Singularly, each of these cases expressly recognized the rule for which we contend.

E. VARIOUS STATEMENTS CONTAINED IN APPELLEE'S BRIEF

We note upon Appellee's Brief, page 28, the horrible example of a direct insurer retaining \$500,000 upon a particular structure and taking out an excess of loss reinsurance contract covering \$499,000 of the \$500,000. Our answer to that predicament is that the reinsured if it did not know this fact would be amply protected by the rules requiring good faith as set out on pages 15 to 18 of Appellee's Brief, but we most certainly insist that the Appellant fully complied with the requirement of informing the Appellee of the existence of its catastrophe excess reinsurance. If, however, the reinsured in that case was fully informed as to this \$499,000 excess of loss reinsurance it always had the option of refusing the tendered cessions, but if it accepted them and made no objection it would most certainly be a gross breach of good faith in the reinsurer to accept a premium upon, say, \$50,000 of a \$50,000 cession of insurance and keep that premium if there is no loss, but insist that its actual liability was reduced to \$1,000 in case of a loss, which is exactly what the Appellee is seeking to do in this case.

F. DEFENDANT'S EXHIBIT A-11

In answer to the situation as set out on Appellee's Brief pages 28 to 32, inclusive, we would call attention to the fact that Defendant's Exhibit A-11, the letter from the Appellee, was dated April 1, 1942. The Appellee had filed its appearance in this case in the Superior Court of King County, Washington, on February 6, 1942, nearly two months prior to the writing of this letter and there is absolutely no proof that this letter had actually been sent to all of the insurance companies therein mentioned. Naturally, therefore, the query arises: Was this letter, Defendant's Exhibit A-11, an actual bona fide letter sent to all of its correspondents or was it a mere attempt to manufacture evidence for use in the trial of this case? At any rate, the language of this Defendant's Exhibit was clearly intended to bolster up their contention that excess of loss reinsurance should be taken into account in computing net retention unless there was a specific agreement that it should not be taken into account. The Appellant, however, did not fall into the trap of signing this agreement, or of agreeing to the contents of this letter. The answer to this letter was that an excess of loss contract starting at \$4800 was entirely too low; and in this connection, we would call attention to the situation with reference to the cession of reinsurance by the Appellee to the Appellant, which is referred to in our brief on page 24, wherein in the event of a loss by the Appellee of \$50,000 such loss would have been reduced by its excess insurance to the sum of only \$18,500. This reinsurance had been knowingly and willingly accepted by the Appellant,

ut the entire meaning of the incident to which the Appellee now refers, even assuming that Plaintiff's Exhibit A-11 was written in good faith, is that Mr. Beall thought that the reduction of the excess of loss limit to \$4800 was entirely too great.

Furthermore, if this letter was actually written in good faith to all of the Appellee's reinsurers, it would indicate that the Appellee took out this excess of loss reinsurance without first obtaining the consent of their reinsurers. So long as these reinsurers failed to give that consent, they retained the option, if Appellee's contention is correct, of retaining premiums on this reinsurance in case there was no loss, but in case of a loss claiming deduction on account of this excess of loss reinsurance. It is most certainly a peculiar situation where the Appellee was making the contention that it was a perfectly proper and legitimate procedure to take such excess of loss reinsurance into account in reducing pro rata any loss on a specific reinsurance cession and yet that they should have taken out this extraordinary excess of loss reinsurance without first having obtained permission from their reinsurers.

Also, the statement of Mr. Beall found in italics at the end of the quotation from his testimony on p. 29 is entirely consistent with Appellant's contention. If the Appellee's contention is correct then the reduction of the attachment point to \$5,000 would automatically reduce the reinsured's "net retention" and automatically reduce the reinsurer's liability in case of loss, but Mr. Beall's statement "I would assume they had probably cut their retention on that risk," clearly

means that he would assume that they had, by specific reinsurance cut their retention to fit the attachment point of the excess of loss reinsurance.

G. APPELLEE'S WITNESSES

In our Opening Brief, we analyzed the testimony of these witnesses and showed that the statements which appear to support Appellee's theory were mainly advice to the Court as to how it should decide the case, such advice being founded upon the interpolation of the two terms "a total loss" and "in one event."

On page 34 of Appellee's Brief, we find the remarkable statement that examples had been given by these experts of a reinsurance contract provision which "provided, as does the Treaty here, that all reinsurance, including excess of loss reinsurance, must be considered in determining and stating net retention." These witnesses did not state any such thing. We find on page 297 a clause which Mr. Edwin Stuart had himself framed *as a proper clause to express that idea*, but he himself stated "as to the second clause I read (which was this clause) I do not think it is as customary but it sets forth clearly what the net retention shall be." It will be noticed that this definition expressly and accurately states a formula which could be used in considering excess of loss reinsurance in computing net retained line; that is, that the amount deductible on account of excess of loss reinsurance of net retention should be computed by including the amount and that that amount should be the loss that the reinsured could sustain "if the loss on such risk were total and no other risk was involved in the same occurrence." Now, there is ab-

solutely nothing in this Insurance Treaty or in the documents relating to the reinsurance here in question which justifies the interpolation of those terms in this contract, but the court, in interpreting net retention as the Appellee desires, must flounder hopelessly at sea with the six different amounts which might be used for deduction purposes as we set forth on pages 51 and 52 of our Opening Brief. Now, the question occurs, why did this witness state that all these words were necessary or even proper in a clause to define "net retained lines" if the words "net retained lines" were unambiguous and meant everything that this clause of 58 words means? How long would an insurance treaty be if every expression in it which was "clear and unambiguous" required 58 words in which to define it?

The testimony of Mr. John Alden Towers contained on pages 317 and 321 is merely to the effect that provisions are frequently inserted in treaties to the effect that net retained lines shall not be considered as being reduced by any amount recoverable from excess of loss reinsurance, but that is a very different matter from a statement that net retention had ever, within the experience of the witness, been taken into account in computing net retained line.

In this connection, we might say that on pages 43 and 44 of our opening brief, we quoted exactly the extracts from the testimony of the two witnesses here cited, which positively admits that all the requirements of the reinsurance practice have been complied with if the reinsurer knows of the existence of the

excess of loss contract; but, as we have shown, the Appellee did in this case know of such reinsurance.

We note at the foot of page 34 the statement: "Where, however, the Treaty does not specifically exclude excess of loss reinsurance, it must be considered by the ceding company in determining and stating its net retention and must be noted in the cession papers." Reference is here made to Tr. 153, which is the testimony of J. M. Legris, who merely states that it is the practice of the *Appellee* when it is passing upon the question of whether it will authorize particular insurance to consult only the documents with relation to that particular transaction. It most certainly would be a nice comfortable rule of law for insurance companies if they could safely follow such a practice; that is, to close their eyes to all the information which they already have in passing upon each transaction. But how does that square with their own practice in ceding insurance such as was evidenced by Plaintiff's Exhibit 2 where their net retention was stated at \$71,000, while as we showed on pages 24 and 25 of our Opening Brief a loss might very easily happen under which their net loss would be \$18,500?

On page 35 of Appellee's Brief, an attempt is made to state what Appellee "without doubt would have" done if Appellee had been notified of the existence of this excess of loss reinsurance. One answer to this is that they did have this information. Another answer is that they themselves followed exactly the same practice as evidenced by Plaintiff's Exhibit 2 (See our opening brief, pages 24 and 25) and that

the Appellant had previously on many occasions accepted similar cessions, Plaintiff's Exhibit 3, as set forth and explained on Tr. 216-221. It is plain that Appellee was perfectly willing to accept cessions of reinsurance together with the premiums earned by such acceptance until a loss occurred where it was more profitable to claim that they did not know of the existence of this catastrophe excess reinsurance and thereby attempt to avoid the payment of a just claim.

H. SUMMARY OF APPELLEE'S ARGUMENT

The summary of Appellee's argument, beginning at the foot of page 35, is somewhat interesting in its inconsistencies. First it states that the definition of net retention is "couched in plain English. It is clear, definite, certain and unambiguous." In their second paragraph they state that net retention is defined in the Treaty or in the application or correspondence covering the specific cession. Now, if "net retention" defines itself, why should it be defined in the Treaty by such definitions as were proposed by the witness Edwin Stuart at Tr. 297, in which, as we have heretofore stated, it took 58 words to define this so-called "certain and unambiguous" term?

The third paragraph is not borne out by the testimony in any respect. The witness John D. Pryce, with an experience beginning in 1920 with work "almost entirely in the field of reinsurance" (Tr. 243) could remember but one occasion where excess of loss reinsurance had been so much as mentioned in a daily report (Tr. 251-252. The various experts had various clauses that they used or would rec-

commend using, but their whole testimony upon this point and the entire recital contained in this paragraph 3 indicates that it was the universal usage not to consider excess of loss reinsurance in computing net retention.

The effect of paragraph 4 depends upon the definition of "net retention." If the definition of "amount retained net" refers only to the deduction of specific reinsurance (that is, reinsurance effected upon the one or more specific risks covered by specific reinsurance), then the remainder of the clause is a mere repetition of the same idea.

I. NO TESTIMONY THAT CATASTROPHE INSURANCE IS EVER CONSIDERED

On Appellee's Brief, page 37, we note that Counsel for Appellee has noticed our challenge to cite where it appears in the record that a single witness testified that ever in his experience had he actually seen "net retention" computed by taking into account excess reinsurance of the type of defendant's Exhibit 1. Counsel then state that we were wrong in making this statement, and that it is very plain that the ceding companies do compute their "net retention" by taking into account excess of loss reinsurance, *but they do not cite a single page in the transcript where any such testimony appears*, and this is for the simple reason that *no such testimony is in this record*. As we stated in our opening brief the witnesses for the Appellee stated two circumstances under which catastrophe excess reinsurance is admittedly not taken into account in computing net retention and evidently no transaction had ever come

to their knowledge where at least one of these circumstances had not existed. Their testimony is entirely limited to the expression of the opinion that the Appellant should have adopted one or the other of these two circumstances, and as we showed in our Opening Brief (pp. 29 *et seq*) *we had adopted both.*

Of the truth of the statement of this limitation upon the testimony of Appellee's witnesses, the extracts of the testimony of Mr. Pryce and Mr. Towers set forth beginning at the foot of page 37 of Appellee's Brief, is a fair sample of the evidence. Both of these witnesses in these extracts state that it is proper for reinsurers to mention in some way their excess of loss reinsurance, with which we agree; but that is far different from attempting the impossible by picking out one of the six amounts (see our Opening Brief, p. 51) which might be used in deducting excess of loss reinsurance from the reinsured's gross insurance.

J. INTERPRETATION BY APPELLEE'S WITNESSES OF "NETT RETAINED LINES"

We next, on page 39 of Appellee's Brief, see an attempted explanation of the fact that all of the Appellee's witnesses adopted as a matter of course the definition of "nett retained lines only" as contained in Appellant's catastrophe reinsurance contract, Plaintiff's Exhibit 1, to mean \$50,000. Now, there is absolutely no definition attempted in this catastrophe contract of "nett retained lines." There it stands without any attempt at definition contained in the contract. We fully agree with Appellee's counsel's statement that, of course, in construing this

policy anybody would take it that nett retained lines meant in this case \$50,000, and we collected from Lloyd's on that basis; but, that merely goes to show that "net retained lines" in reinsurance parlance always means exactly what Appellant's witnesses stated it meant: the "gross amount less specific re-insurance."

K. THE SIX VARIANT METHODS OF COMPUTING "NET RETENTION"

Beginning on page 40, Appellee's Brief attempts to answer our question of the six variant methods of determining the proper deduction from the gross insurance on account of excess of loss reinsurance, but all that we can gather out of this explanation is that, of course, it was the duty of appellant "to frankly state its maximum liability with respect to this bridge in the event of a total loss." Now, why "a total loss" and why a loss on this one subject matter of insurance "unconnected with any other loss." There is absolutely nothing in the contract which justifies any assumption that this problem is to be computed so that the result shall be \$18,000. The only reason that this Court is asked to compute this problem in this manner is that the Appellee has itself seen fit to compute it that way and has also framed its questions that its witnesses were compelled to do the same. Why go so far as to assume that this bridge might be a total loss and stop right there without any assumption whatever that no other property upon which the Appellant carries insurance is going to be lost in the same catastrophe? Most certainly a catastrophe that

would have wiped out this bridge, including piers, superstructure, cable anchorage, approach, grading and paving, and so forth, would have damaged other property upon which Appellant carried insurance. So let us repeat, why go so far as either to assume a total loss of this property or there to stop short off without assuming a loss of any other property whatsoever? Appellee's Counsel utterly fail to undertake the answering of this interesting question. The parties to the contract had entered into the contract upon the basis that it was the judgment of the reinsured company that a 50% loss was the utmost loss which could be expected, and under the terms of the contract this judgment of the Appellant company was absolutely binding upon the Appellee. So why interpret this contract by assuming that it was made in contemplation of a total loss? If the contract had been made in contemplation of computing net retention on the basis of actual loss, then alternative No. 4 was the proper amount to be deducted. Furthermore, there is not the slightest reason why alternative No. 1 should not be adopted if excess of loss reinsurance is to be taken into account. If we are to use maximum amounts there is no question but what \$153,000 was the maximum amount that the Lloyd's organization might be called upon to pay under this policy. Appellee's Counsel say that this is absurd to talk about deducting \$153,000 from \$50,000. So do we so say; but there is just as much reason, so far as interpretation of the contract is concerned for adopting any one of these alternatives as there is for adopting any other. A probable reason of Appellee's for adopting

this claim that \$18,000 should be deducted might be that it was hoping that this amount would be agreed upon as a reasonable compromise settlement. *At least, there is no other reason which comes within even the range of the plausible.*

L. APPELLEE'S NOTICE OR KNOWLEDGE OF THE EXISTENCE OF APPELLANT'S CATASTROPHE INSURANCE

Beginning with page 43, Appellee's Brief, attempts to minimize the effects of the various methods by which the Appellee obtained knowledge of this catastrophe insurance. It first attacks the conference between Mr. Beall and Mr. Easton, upon the ground that "It was a general conference concerning their underwriting programs, etc." On the contrary, it was a special conference caused by Mr. Easton looking Mr. Beall up and proposing this very reinsurance relationship.

In the language of Mr. Beall, "he offered an equal line with us * * * and I went into a great deal more detail than I normally would (Tr. 226). * * * We had a complete discussion of our underwriting program and of the reinsurance each company carried" (Tr. 277).

In other words, this information was conveyed specifically in order to form a basis of the entering into this reinsurance contract relationship. *And there is no attempt to deny this by the production of any testimony.*

As to the use of Best's, the reasons given on page 45 to 47 for the Appellee's not referring to Best's do not agree with the reason given by Mr. Legris,

which was as shown on pages 47 and 48 of our Opening Brief, and was practically summed up in the last sentence regarding their knowledge of this catastrophe insurance: *"I would assume we knew it, because it is a common practice."*

As to the testimony of Mr. Sullivan regarding statements of this catastrophe reinsurance, contained in the examination reports, as stated in our Opening Brief, all that these Exhibits show "is that Counsel for the Appellee, after searching through the Department records, was able to find three reports which did not specifically state the amounts of the excess reinsurance."

M. WHAT IS THE APPELLANT'S THEORY?

Next we come upon the astounding statement that "appellant contends that when it wrote the insurance upon the Tacoma Narrows Bridge it concluded that the bridge constituted two risks." Furthermore, in the course of this argument, they attempt to state what the Appellant should have stated in the various documents, even going so far as to say that the Appellant, in its letter of October 1, 1941, Defendant's Exhibit A-8, Tr. 97, should have stated some sort of argument in favor of a two-risk theory. To sum up this, we have fully covered what our theory was, and that is that, as stated in Defendant's Exhibit A-8, the Appellant had in good faith fixed a PML of 50% and had so stated upon the reinsurance certificate. This has been the Appellant's theory from the start and it is rather a novel procedure, to say the least, for Appellee to seek to garble that theory by dragging in an insurance man's term "two-risk" which, to any-

one other than an insurance man, has a very different meaning from what was intended.

In this connection, however, we would call attention to the fact that Counsel for the Appellee further make no attempt to answer our statement contained on page 40 of our Opening Brief that they were very meticulous about asking each one of their witnesses whether PML indicated the number of risks involved (which manifestly could be answered in the negative), but *they never asked a single witness whether PML expressed any idea of the size of the maximum "one risk" involved.*

We believe that we have already completely covered Mr. Towers' claim that calling a single bridge more than one risk was equivalent to an attempt to make black out of white. Further, on page 61, we learn for the first time that we are claiming that the "Court should read into Appellant's daily report (Defendant's Exhibit A-5) some such declaration as this 'Northwestern finds that the bridge constitutes two risks and, therefore, cedes to Union under the Treaty \$25,000 on each of two risks'." What we do assert is that, according to Mr. Legris' own statement, the term PML 50% which appears in that exhibit meant to him that the maximum risk involved in this insurance was 50%, and that the Appellee has never attempted to deny this statement and that Appellee's Counsel now attempt to meet it by merely attempting to first falsely misstate the claim in such a way as to make it appear ridiculous.

On pages 62 and 63, we find the argument that there were various ideas relative to what constitutes

one risk, and, also, as to everything which PML might signify. Such an argument, however, has no place in this case. As we have frequently stated, the contract itself left up to the Appellant the duty of stating what constituted one risk and during the passing of letters between the parties relative to adjusting this loss, the Appellee had declared itself satisfied that they had not at any time questioned this point (Tr. 46). If the Appellant had been guilty of any fraud in understating this "one loss," it would have been a complete defense to any recovery whatsoever in this action; but no such defense was ever raised, and, therefore, the action of the Appellant in fixing one risk in this matter at 50% is not a subject of dispute in this case. Neither do refined definitions about the meaning of PML have any place in this case. As we showed upon page 38 of our Opening Brief, Mr. Legris, the officer of the Appellee who was representing the Appellee at the trial of this case, agreed with Appellant's Counsel's statement that "It is understood that there is no greater risk involved than the estimated PML," and Appellee's Brief has not even dignified this statement by referring to it. Therefore, refined arguments about other meanings of PML, what constitutes one risk and what may be meant by such phrases as two risks, three risks or four risks, have no place in this case.

On page 41 of our Opening Brief, we devoted some attention to Defendant's Exhibit A-17, and showed the meaning of the various sheets contained in that exhibit. As a final misstatement, we find the suggestion that Appellant should have stated, "Bridge

underwritten as two separate risks of \$25,000 each and \$25,000 is ceded on each risk." Once more, we state positively that this is not and never was our contention and that our contention was that the maximum risk involved in the insurance on this bridge was 50%, and that this fact was properly communicated to the Appellee by the expression PML 50% and the Appellee understood at the time that that expression meant exactly what our claim is; and that is, that it was the honest opinion of the underwriters of the Appellant that the greatest possible risk involved in the writing of this insurance was 50% of the amount of the insurance.

N. CONCLUSION

We would respectfully submit that the Appellee has made not the slightest attempt to answer the points submitted by us in our Opening Brief, but have adopted the course of attempting to state that we have asserted claims which we in fact have never asserted and which are perfectly silly upon their faces, and then have proceeded to demolish such bogus claims. We therefore submit that the essential facts in this case are as stated in our Opening Brief: that the Appellee has not seen fit to point out where a denial of any of these facts can be found in the record, and that these facts entitled the Appellant to judgment as prayed for.

Respectfully submitted,

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